

No. 17093

United States
Court of Appeals
for the Ninth Circuit

HUMBOLDT PLACER MINING COMPANY, a
Corporation, and DEL DE ROSIER,

Appellants,

vs.

RAYMOND R. BEST, as State Supervisor, Bureau
of Land Management, et al.,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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vs. Raymond R. Best, etc.

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In the District Court of the United States of
America for the Northern District of California,
Northern Division

No. 8076

**HUMBOLDT PLACER MINING COMPANY, a
Corporation, and DEL DeROSIER,**

Plaintiffs,

vs.

**RAYMOND R. BEST, as State Supervisor, Bu-
reau of Land Management, and WALTER E.
BECK as Manager, District Land Office, Bu-
reau of Land Management, Department of the
Interior,**

Defendants.

COMPLAINT FOR INJUNCTION

Plaintiffs complain of Defendants and allege:

I.

Jurisdiction is founded upon:

(a) A Federal question arising under 28
U.S.C.A. 1358, Eminent Domain proceedings by the
United States;

(b) Rights to private property under Amend-
ment 5, Constitution of the United States;

(c) The matter in controversy exceeds in value
the sum of \$10,000.00.

II.

That Raymond R. Best, Defendant, is now and at all times stated herein has been the State Administrator for the area of California of the Bureau of Land Management, Department of the Interior with offices at Sacramento, California, and residing therein.

That Walter E. Beck, Defendant, is Manager of the District Land Office, Bureau of Land Management, Department of the Interior at Sacramento, California, residing therein, which area includes the premises hereinafter described.

That all acts performed by them as hereinafter set forth are claimed by them to have been done and performed in their respective official capacities pursuant to Reorganization Plan No. 3, Sections 1 and 2, effective May 24, 1950 (15 F.R. 3174, 64 Stat. 1262), amending 1946 Reorganization Plan No. 3, Section 403, effective July 16, 1946 (11 F.R. 7876, 60 Stat. 1100), as amended by divers directives.

III.

That Humboldt Placer Mining Company, a Corporation, is a Corporation organized and existing under the laws of the State of California and doing business in said State; and that said Corporation, Plaintiff and Plaintiff Del de Rosier, are the owners entitled to the possession of all those certain mines and mining claims situate, lying, and being in the County of Trinity, State of California, described as follows, to wit:

Ukiah as amended— $S1\frac{1}{2}NW\frac{1}{4}$, $N1\frac{1}{2}SW\frac{1}{4}$ Sec. 5, T. 34 N., R. 8 W., M.D.M.—Misc. Book 12, page 166;

Covele as amended— $SE\frac{1}{4}$ Sec. 6, T. 34 N., R. 8 W., M.D.M.—Misc. Book 12, page 165;

Humboldt— $SW\frac{1}{4}$ Sec. 6, T. 34 N., R. 8 W., M.D.M.—Misc. Book 9, page 590;

White— $E1\frac{1}{2}NW\frac{1}{4}$, $W1\frac{1}{2}NE\frac{1}{4}$ Sec. 7, T. 34 N., R. 8 W., M.D.M.—Misc. Book 10, page 622;

Tannery— $SE\frac{1}{4}NE\frac{1}{4}$, $E1\frac{1}{2}SE\frac{1}{4}$, $SW\frac{1}{4}SE\frac{1}{4}$ Sec. 2, T. 34 N., R. 9 W., M.D.M.—Misc. Book 10, page 412;

Tannery No. 2—Lots 1 and 2, $SW\frac{1}{4}NE\frac{1}{4}$, $NW\frac{1}{4}SE\frac{1}{4}$ Sec. 2, T. 34 N., R. 9 W., M.D.M.—Book 16, page 189;

Jackson— $SW\frac{1}{4}SW\frac{1}{4}NW\frac{1}{4}$, $E1\frac{1}{2}SW\frac{1}{4}NW\frac{1}{4}$, $SE\frac{1}{4}NW\frac{1}{4}$, $E1\frac{1}{2}NE\frac{1}{4}NW\frac{1}{4}$ Sec. 2, T. 34 N., R. 9 W., M.D.M.—Misc. Book 10, page 626;

Cademartori— $NW\frac{1}{4}NW\frac{1}{4}NW\frac{1}{4}$ (or $NW\frac{1}{4}$ of Lot 4) Sec. 2, $S1\frac{1}{2}SW\frac{1}{4}NE\frac{1}{4}$, $SE\frac{1}{4}NW\frac{1}{4}$, Lots 1 and 2 or $N1\frac{1}{2}NE\frac{1}{4}$ Sec. 3, T. 34 N., R. 9 W., M.D.M.—Book 15, page 369;

Furnell— $NW\frac{1}{4}SW\frac{1}{4}NW\frac{1}{4}$, $SW\frac{1}{4}NW\frac{1}{4}NW\frac{1}{4}$, $E1\frac{1}{2}NW\frac{1}{4}NW\frac{1}{4}$, $W1\frac{1}{2}NE\frac{1}{4}NW\frac{1}{4}$, Sec. 2, $SE\frac{1}{4}NE\frac{1}{4}$, $NE\frac{1}{4}SW\frac{1}{4}NE\frac{1}{4}$ Sec. 3, T. 34 N., R. 9 W., M.D.M.—Book 29, page 364;

Last Chance as amended— $W1\frac{1}{2}SW\frac{1}{4}$, $S1\frac{1}{2}NW\frac{1}{4}$ Sec. 1, T. 34 N., R. 9 W., M.D.M.—Misc. Book 12, page 168;

Lewis—SE $\frac{1}{4}$ NE $\frac{1}{4}$, Lot 1, S $\frac{1}{2}$ of Lot 2, S $\frac{1}{2}$ N $\frac{1}{2}$ of Lot 2, Sec. 1, T. 34 N., R. 9 W., M.D.M.—SW $\frac{1}{4}$ -NW $\frac{1}{4}$ Sec. 6, T. 34 N., R. 8 W., M.D.M.—Misc. Book 10, page 627;

Enough as amended—N $\frac{1}{2}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 1, T. 34 N., R. 9 W., M.D.M.—Misc. Book 12, page 164;

Faurrell—S $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 34, N $\frac{1}{2}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$, E $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 35, T. 35 N., R. 9 W., M.D.M.—Book 15, page 371.

IV.

That the said mining claims and each of them include lands of established and known mineral character upon which as to each separate claim a discovery of valuable mineral, to wit, gold, has been made on each, and that the said claims and each of them have been and are held and worked by extensive excavations for their valuable gold content; that the value thereof is in excess of ten thousand (\$10,000.00) Dollars.

V.

That the said Defendant, purportedly acting in their official capacities, filed in their offices as above set forth an amended contest complaint charging in the name of the United States of America as Contestant, that the said claims and each of them were non-mineral in character; that no discovery had been made and ordering Plaintiffs herein under penalty of cancellation and loss of each one of said

mining locations to answer said alleged complaint within thirty days; that a true copy of said amended contest complaint is hereto attached, hereby referred to, made a part hereof and marked Exhibit "A."

VI.

That said Defendants so acted notwithstanding that there was and now is another action pending between the same parties for the same cause and involving the same lands and mining claims in the District Court of the United States for the Northern District of California, Northern Division, and identified therein as Civil Number 7570, in eminent domain and filed in said Court and Writ of Possession issued to the United States of America, long prior to the issuance of the aforesaid amended complaint by Defendants herein. Reference is hereby made to said eminent domain proceedings on file in this court.

VII.

That said Defendants in so proceeding through the medium of said alleged contest complaint were acting in excess of their statutory authority therefor; and the said proceeding will result in a multiplicity of suits whereby the Plaintiffs herein must defend both before the said Bureau of Land Management and the District Court of the United States aforesaid.

VIII.

That the acts of Defendants will further require Plaintiffs to enter in upon prolonged and useless

litigation and cause Plaintiffs herein to submit wholly to an unlawful exercise of attempted jurisdiction on the part of the Defendants.

IX.

That the United States of America as Contestant in the said Contest is the Plaintiff in the said eminent domain proceedings and has selected this United States District Court as the proper court to determine all questions involved in the alleged contest, and Plaintiffs allege that Defendants have invoked and do now invoke the power and sovereignty of the United States of America in this proceeding of contest without any warrant or authority of law.

X.

Plaintiffs allege there is no adequate, complete or speedy remedy at law available under any administrative process or before any other Court in order to save Plaintiffs' mining property from becoming further encumbered in useless litigation; that no officer of the Department of the Interior has any power or authority to finally settle and determine the constitutional questions herein involved or any power or authority to authorize the cancellation and confiscation of the mining claims of Plaintiffs aforesaid, by any alleged contest until the questions involved have been determined by the above-entitled Court and that the settlement and determination of all questions of title and of the right of the United States to the use and occupa-

tion of said premises are wholly and entirely within the exclusive jurisdiction of the above-entitled Court.

Wherefore, Plaintiffs pray judgment against Defendants:

1. That they and their subordinates, agents, attorneys and clerks and each of them be permanently enjoined and restrained from in any manner proceeding further against Plaintiffs herein, under the said alleged amended contest complaint or other similar proceeding seeking cancellation or nullification of the mining claims of said Plaintiffs.
2. That pending hearing in this Court on this Complaint, the said Defendants and each of them and their subordinates, agents, attorneys and clerks be enjoined and restrained from issuing any notices or orders based upon or having reference to said contest complaint or other similar proceeding or taking any action of any kind or character based thereon, tending to cloud the title of Plaintiffs to said mining claims or any of them or to cancel the same by any order or directive based upon or referring to said alleged contest complaint.
3. That Plaintiffs be awarded such damages as may be proven and established as being suffered by them through the acts of Defendants herein.
4. And for such other, further separate and additional relief as to the Court seem meet and equitable in the premises.

10 *Humboldt Placer Mining Co., et al.*

5. And for Plaintiffs costs of suit.

/s/ CHAS. L. GILMORE,

Attorney for Plaintiffs.

Duly verified.

EXHIBIT A

United States Department of the Interior, Bureau
of Land Management, Land Office, Sacramento,
California

Contest No. 10-747

UNITED STATES OF AMERICA,

Contestant,

vs.

HUMBOLDT PLACER MINING COMPANY, a
Corporation, and DEL DE ROSIER,

Contestees.

Involving: Ukiah, Covelo, Humboldt, White, Tan-
ery, Tannery No. 2, Jackson; Cademartori,
Furnell, Last Chance, Lewis, Enough and
Faurrell Placer Mining Claims.

AMENDED COMPLAINT

In accordance with Title 43, Code of Federal
Regulations, Part 221, the United States of Amer-
ica, acting by and through the State Supervisor,
Bureau of Land Management, Department of the
Interior, brings this amended contest against the

contestees named above, and for cause of action alleges:

I.

The lands hereinafter described are public lands of the United States.

II.

The contestant is informed and believes that the above-named contestees are the owners, or assert the ownership of the above-named unpatented mining claims. The contestant is also informed and believes that the address of the Humboldt Placer Mining Company is c/o E. W. Phipps, President, Box 115, Eureka, California, and that the address at which service may be had on Humboldt Placer Mining Company is c/o Anthony J. Kennedy, Authorized Attorney-in-Fact and Law and Agent, 635 Forum Building, Sacramento, California, and that the address of Del de Rosier is 2226-28th Street, Sacramento, California.

III.

Said placer mining claims are situate in Trinity County, State of California, and as nearly as they can be identified, they are embraced within the following areas and are recorded in the official records of Trinity County:

Ukiah as amended—S $\frac{1}{2}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 5, T. 34 N., R. 8 W., M.D.M.—Misc. Book 12, page 166;

Covelo as amended—SE $\frac{1}{4}$ Sec. 6, T. 34 N., R. 8 W., M.D.M.—Misc. Book 12, page 165;

12 *Humboldt Placer Mining Co., et al.*

Humboldt—SW $\frac{1}{4}$ Sec. 6, T. 34 N., R. 8 W.,
M.D.M.—Misc. Book 9, page 590;

White—E $\frac{1}{2}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 7, T. 34 N.,
R. 8 W., M.D.M.—Misc. Book 10, page 622;

Tannery—SE $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec.
2, T. 34 N., R. 9 W., M.D.M.—Misc. Book 10, page
412;

Tannery No. 2—Lots 1 and 2, SW $\frac{1}{4}$ NE $\frac{1}{4}$,
NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 2, T. 34 N., R. 9 W., M.D.M.—
Book 16, page 189;

Jackson — SW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$,
SE $\frac{1}{4}$ NW $\frac{1}{4}$, E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 2, T. 34 N., R.
9 W., M.D.M.—Misc. Book 10, page 626;

Cademartori—NW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ (or NW $\frac{1}{4}$ of
Lot 4) Sec. 2, S $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, Lots 1
and 2 or N $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 3, T. 34 N., R. 9 W., M.D.M.
—Book 15, page 369;

Furnell—NW $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$,
E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 2, SE $\frac{1}{4}$ -
NE $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 3, T. 34 N., R. 9 W.,
M.D.M.—Book 29, page 364;

Last Chance as amended—W $\frac{1}{2}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ -
NW $\frac{1}{4}$ Sec. 1, T. 34 N., R. 9 W., M.D.M.—Misc.
Book 12, page 168;

Lewis—SE $\frac{1}{4}$ NE $\frac{1}{4}$, Lot 1, S $\frac{1}{2}$ of Lot 2, S $\frac{1}{2}$ N $\frac{1}{2}$
of Lot 2, Sec. 1, T. 34 N., R. 9 W., M.D.M.—SW $\frac{1}{4}$ -
NW $\frac{1}{4}$ Sec. 6, T. 34 N., R. 8 W., M.D.M.—Misc.
Book 10, page 627;

Enough as amended— $N\frac{1}{2}SE\frac{1}{4}$, $NE\frac{1}{4}SW\frac{1}{4}$, $SW\frac{1}{4}NE\frac{1}{4}$ Sec. 1, T. 34 N., R. 9 W., M.D.M.—Misc. Book 12, page 164;

Faurrell— $S\frac{1}{2}SE\frac{1}{4}$ Sec. 34, $N\frac{1}{2}NE\frac{1}{4}SW\frac{1}{4}$, $E\frac{1}{2}NW\frac{1}{4}SW\frac{1}{4}$, $SW\frac{1}{4}SW\frac{1}{4}$ Sec. 35, T. 35 N., R. 9 W., M.D.M.—Book 15, page 371.

IV.

According to the records of the Sacramento Land Office, the $N\frac{1}{2}$ of Lot 1, now designated as Lot 5 and the $S\frac{1}{2}N\frac{1}{2}$ of Lot 2, now designated as a portion of Lot 6 of Section 1, T. 34 N., R. 9 W., M.D.M., which affects the Lewis placer claim, is embraced within Forest Homestead Patent No. 1076218 of June 10, 1935, without a reservation of minerals to the Government. The $SW\frac{1}{4}SW\frac{1}{4}$, $E\frac{1}{2}NW\frac{1}{4}SW\frac{1}{4}$ Section 35 and the $SE\frac{1}{4}SE\frac{1}{4}$ Section 34, T. 35 N., R. 9 W., M.D.M., which affects the Faurrell placer claim, is embraced in Mineral Entry No. 663 patented July 1, 1908.

Therefore, the issues raised in the pleadings affect only those lands title to which is still in the United States.

So far as known to the contestant there are no proceedings pending before the Department of the Interior for the acquisition of title to or an interest in such lands on behalf of any party other than the contestees.

V.

With respect to the Tannery No. 2, Cademartori, Furnell and Lewis placer mining claims the contestant charges separately and collectively that:

(a) The land embraced within the claims is non-mineral in character.

(b) Minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery.

(c) The Cademartori placer claim, as described in the location notice, embraces inconiguous tracts of land, and is therefore contrary to law.

VI.

With respect to the following claims the contestant charges separately and collectively that each of the following legal subdivisions is non-mineral in character and, therefore, should be excluded from the affected mining claims:

(a) The $NW\frac{1}{4}SW\frac{1}{4}NW\frac{1}{4}$, $NE\frac{1}{4}SW\frac{1}{4}NW\frac{1}{4}$, $NW\frac{1}{4}SE\frac{1}{4}NW\frac{1}{4}$, $NE\frac{1}{4}SE\frac{1}{4}NW\frac{1}{4}$, $SE\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}$ in Section 5, T. 34 N., R. 8 W., M.D.M. which affects the Ukiah placer claim as amended.

(b) The $NW\frac{1}{4}NW\frac{1}{4}SE\frac{1}{4}$, $NE\frac{1}{4}NW\frac{1}{4}SE\frac{1}{4}$, $SW\frac{1}{4}SE\frac{1}{4}SE\frac{1}{4}$, $SE\frac{1}{4}SE\frac{1}{4}SE\frac{1}{4}$ in Section 6, T. 34 N., R. 8 W., M.D.M. which affects the Covelo placer claim as amended.

(c) The $NW\frac{1}{4}NW\frac{1}{4}SW\frac{1}{4}$ (or $NW\frac{1}{4}$ of Lot 6), $NE\frac{1}{4}NW\frac{1}{4}SW\frac{1}{4}$ (or $NE\frac{1}{4}$ of Lot 6), $NW\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}$, $NE\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}$ in Section 6, T. 34 N., R. 8 W., M.D.M., which affects the Humboldt placer claim.

(d) The $SE\frac{1}{4}SE\frac{1}{4}NW\frac{1}{4}$, $SW\frac{1}{4}SW\frac{1}{4}NE\frac{1}{4}$ in Section 7, T. 34 N., R. 8 W., M.D.M. which affects the White placer claim.

$SW\frac{1}{4}SW\frac{1}{4}NE\frac{1}{4}$, $SE\frac{1}{4}SW\frac{1}{4}NE\frac{1}{4}$, in Section 1, T. 34 N., R. 9 W., M.D.M. which affects the Enough placer claim as amended.

(i) The $NW\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}$, $NE\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}$ in Section 35, T. 35 N., R. 9 W., M.D.M. which affects the Faurrell placer claim.

(j) The $SE\frac{1}{4}NE\frac{1}{4}NE\frac{1}{4}$ (or $SE\frac{1}{4}$ of Lot 1), $SW\frac{1}{4}SE\frac{1}{4}NW\frac{1}{4}$, $SE\frac{1}{4}SE\frac{1}{4}NW\frac{1}{4}$, $SW\frac{1}{4}SW\frac{1}{4}NE\frac{1}{4}$, $SE\frac{1}{4}SW\frac{1}{4}NE\frac{1}{4}$ in Section 3, T. 34 N., R. 9 W., M.D.M., which affects the Cademartori placer claim.

Wherefore, Contestant requests that it be allowed to prove its allegations and that the mining claims

(e) The $NW\frac{1}{4}SE\frac{1}{4}NE\frac{1}{4}$, $NE\frac{1}{4}SE\frac{1}{4}NE\frac{1}{4}$, $SW\frac{1}{4}SE\frac{1}{4}NE\frac{1}{4}$, $SE\frac{1}{4}SE\frac{1}{4}NE\frac{1}{4}$ in Section 2, T. 34 N., R. 9 W., M.D.M., which affects the Tannery placer claim.

(f) The $NE\frac{1}{4}NE\frac{1}{4}NW\frac{1}{4}$ (or $NE\frac{1}{4}$ of Lot 2), $SE\frac{1}{4}NE\frac{1}{4}NW\frac{1}{4}$ (or $SE\frac{1}{4}$ of Lot 3), $NE\frac{1}{4}SW\frac{1}{4}NW\frac{1}{4}$, $NW\frac{1}{4}SE\frac{1}{4}NW\frac{1}{4}$ in Section 2, T. 34 N., R. 9 W., M.D.M. which affects the Jackson placer claim.

(g) The $NW\frac{1}{4}SW\frac{1}{4}NW\frac{1}{4}$, $NE\frac{1}{4}SW\frac{1}{4}NW\frac{1}{4}$, $NW\frac{1}{4}SE\frac{1}{4}NW\frac{1}{4}$, $NE\frac{1}{4}SE\frac{1}{4}NW\frac{1}{4}$, $SW\frac{1}{4}SW\frac{1}{4}NW\frac{1}{4}$, $SE\frac{1}{4}SW\frac{1}{4}NW\frac{1}{4}$, $SW\frac{1}{4}SE\frac{1}{4}NW\frac{1}{4}$, $SE\frac{1}{4}SE\frac{1}{4}NW\frac{1}{4}$ in Section 1, T. 34 N., R. 9 W., M.D.M. which affects the Last Chance placer claim as amended.

(h) The $NW\frac{1}{4}SW\frac{1}{4}NE\frac{1}{4}$, $NE\frac{1}{4}SW\frac{1}{4}NE\frac{1}{4}$.

named in Paragraph V be declared null and void, and that the mining claims named in Paragraph VI be invalidated as to the lands described in said paragraph.

Notice

This amended complaint is filed in the Sacramento Land Office, Bureau of Land Management, 10th Floor, California Fruit Building, 4th and J Streets, Sacramento, California, and any papers pertaining thereto shall be sent to such office for service on the contestant.

Unless contestees file an answer to the amended complaint in such office within thirty (30) days after service of this notice, the allegations of the amended complaint will be taken as confessed.

Dated: March 17, 1960.

/s/ R. R. BEST,

State Supervisor.

[Endorsed]: Filed April 18, 1960.

[Title of District Court and Cause.]

**MOTION TO VACATE TEMPORARY RE-
STRAINING ORDER; TO DENY PRE-
LIMINARY INJUNCTION; AND TO DIS-
MISS IN PART**

Defendants, through their attorney, Charles R. Renda, Assistant United States Attorney for the Northern District of California, in response to the

Court's order to show cause why a preliminary injunction pendente lite should not be issued (set for hearing on May 9, 1960), move the Court to (1) vacate the temporary restraining order entered herein without notice to defendants on April 18, 1960; (2) deny plaintiff's motion for a preliminary injunction pendente lite; and (3) dismiss the complaint herein with respect to all claims except that known as the Faurrell claim. In support of this motion, defendants submit the attached Memorandum and affidavits.

s. CHARLES R. RENDA,

Assistant U. S. Attorney.

[Endorsed]: Filed May 9, 1960.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

This is a complaint for injunction. Plaintiffs allege that defendants, in their official capacity acting on behalf of the United States, have initiated contest proceedings against certain claims before the Bureau of Land Management. The claims involved are unpatented mining claims located on the public lands. The grounds of contest include the allegations that the land involved is non-mineral in character, and that minerals have not been found in sufficient quantities to constitute a valid discovery. Plaintiffs allege that the claims involved are the subject of condemnation suits filed by the

United States in this Court. A temporary restraining order was granted, on the posting of security. Defendants have moved the Court to vacate that order, and to dismiss the complaint.

It is not disputed that the Government may institute contests of claims such as are alleged, unless the filing of the condemnation suits requires a different result (*Cameron vs. United States*, 252 U.S. 454). Furthermore, it is not disputed that the United States may elect to try issues more usually tried in a contest proceeding in a United States District Court (*United States vs. Schultz*, 31 F. 2d 764). The only question requiring a decision in this case is whether the filing of a condemnation suit in the United States District Court constitutes an irrevocable choice of forum by the United States, so that all contests of the character here involved must then be resolved in such Court.

The affidavits and exhibits filed by defendants in this case disclose that the purpose of the filing of the condemnation suits was to get immediate possession. No authority, or reason, is advanced by plaintiffs which will support the proposition that such suits constitute an irrevocable election of forum. It may be assumed that if the Government raised the issue of validity of the claims in this Court, and at the same time vexed plaintiffs by filing contest claims before the Bureau of Land Management, this Court would have power to protect its jurisdiction, and to prevent harassment of plaintiffs, by enjoining further prosecution of

the contests. In fact, a failure to do so would likely constitute an abuse of discretion (*Crosley Corporation vs. Hazeltine Corporation*, 122 F. 2d 925). But where a court has jurisdiction of an entire controversy, it may wait until a court or tribunal of more limited jurisdiction adjudicates the issues peculiarly within its competency, and then give binding effect to the decision of such court or tribunal (*United States vs. Eisenbeis*, 112 Fed. 190; *United States vs. Adamant Co.*, 197 F. 2d 1; and See: *Railroad Comm'n vs. Pullman Co.*, 312 U.S. 496; and *Louisiana P. & L. Co. vs. City of Thibodaux*, 360 U.S. 25).

The Bureau of Land Management is an agency with special competency and administrative experience in the hearing of contests of claims relating to the public lands. The attempt of counsel for plaintiffs to characterize that body as a "star chamber" is without justification. The procedural safeguards afforded to contestees (See: 43 C.F.R. Sects. 221.1, et seq.), include the right of review by the courts under the Administrative Procedure Act (Title 5, U.S.C., Sects. 1001-1011; and *Adams vs. Witmer*, 271 F. 2d 29).

Assuming that this Court has the power to enjoin further proceedings in the contests which are now at issue, there is no good reason for the exercise of such power. To the contrary, there is every reason to allow the issues of the contests to be resolved by the administrative agency, with its special experience and expertise in these matters.

Harmful multiplicity of litigation will not be involved, for the issues raised in the contests will not be tried by this Court in the condemnation cases. Until the resolution of the contests, the question of whom, if anybody, is entitled to just compensation will be held in abeyance. The power of the Federal courts to review agency decisions under the Administrative Procedure Act does not involve harmful multiplicity of litigation, because a court in such cases exercises a limited function of review.

It is the considered opinion of the Court that defendants' motion to dismiss should be granted. The factual questions, which have arisen as to which contested claims are actually involved in which condemnation suits, need not be resolved. Further, it is not necessary to consider defendants' contention that plaintiffs had themselves instituted patent proceedings before the Bureau of Land Management prior to the filing of the condemnation suits.

It Is, Therefore, Ordered that the temporary restraining order issued by this Court in this cause on April 18, 1960, be, and it is, hereby vacated and dissolved.

It Is Further Ordered that plaintiffs' complaint, and the cause of action sought to be stated therein, be, and the same is, hereby dismissed;

And It Is Further Ordered that defendants prepare all documents necessary for the complete disposition of this case, in accordance with this memorandum and order, and lodge such documents with

the Clerk of this Court pursuant to the applicable rules and statutes.

Dated: June 21, 1960.

/s/ SHERRILL HALBERT.

United States District Judge.

[Endorsed]: Filed June 21, 1960.

In the United States District Court in and for the
Northern District of California, Northern Division

No. 8076

HUMBOLDT PLACER MINING COMPANY, a
Corporation, and DEL DE ROSIER,

Plaintiffs,

vs.

RAYMOND R. BEST, as State Supervisor,
Bureau of Land Management, and WALTER
E. BECK, as Manager, District Land Office,
Bureau of Land Management, Department of
the Interior,

Defendant.

SUMMARY JUDGMENT

This matter having come on before the Court on motion of the defendants to dismiss upon the pleadings; and the Court having considered the various affidavits and documents submitted by the parties hereto, as well as the pleadings, and having here-

tofore filed a memorandum and order in defendants' favor, wherein the temporary restraining order previously issued by this Court was vacated and dissolved and plaintiffs' complaint and cause of action were dismissed, the Court being now fully advised, finds and concludes that:

1. Defendants' motion to dismiss shall be deemed as one for summary judgment pursuant to Rule 12(c) F.R.C.P.

2. There is no genuine issue between the parties as to any material fact herein.

3. The sole question raised by this suit and defendants' motion is whether the filing of a condemnation suit in the United States District Court constitutes an irrevocable choice of forum by the United States, so that a subsequent contest proceeding otherwise properly initiated before the Bureau of Land Management, U. S. Department of the Interior, involving unpatented mining claims located on the property condemned, should be enjoined by the Court.

4. In the condemnation cases here involved the purpose of the suit was to obtain immediate possession of the lands, and the Government has not raised therein the issue of validity of the mining claims concerned; on the contrary, it has specifically asserted its right to retain jurisdiction of this issue for determination by the Bureau of Land Management.

5. Even if the issue of validity had been submitted to this Court in the various condemnation

proceedings, B L M in its role as a quasi-judicial body, could also determine this issue and the Court, in its discretion, could then accept and give binding effect to said decisions.

6. In the circumstances of this case, there is no multiplicity of litigation involved since the issue of validity to be decided in the B L M proceedings will not be decided in the condemnation proceedings.

7. Further, until the resolution of the B L M contest proceedings involving mining claims now in condemnation, the question of who, if anybody, is entitled to just compensation for the claims condemned will be held in abeyance.

8. Plaintiffs here have failed to show any reason or authority which would compel the Court to find that there has been an irrevocable choice of forum by the Government and that the Court should, therefore, issue the injunctive relief sought.

Wherefore, it is hereby ordered, adjudged and decreed that judgment be entered in favor of defendants, with costs, if any.

Dated: July 11, 1960.

/s/ SHERRILL HALBERT,
Judge, United States District Court, Northern District of California.

Lodged July 1, 1960.

[Endorsed]: Filed July 11, 1960.

Entered July 13, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Humboldt Placer Mining Company, a Corporation, and Del De Rosier, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the Summary Judgment entered in this action on July 13, 1960.

September 8, 1960.

/s/ CHAS. L. GILMORE,

Attorney for Plaintiffs,

Humboldt Placer Mining Company and Del de Rosier.

[Endorsed]: Filed September 8, 1960.

[Title of District Court and Cause.]

REQUEST TO DETERMINE AMOUNT OF COST AND SUPERSEDEAS BOND

Plaintiffs above named, having filed notice of appeal to the United States Court of Appeals for the Ninth Circuit, request the Court to fix the amount of combined cost and supersedeas bond on appeal in the above-entitled action, pursuant to Rule 73(c) Rules of Civil Procedure.

Dated September 8, 1960.

/s/ CHAS. L. GILMORE,

Attorney for Appellants.

[Endorsed]: Filed September 8, 1960.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH AP-
PELLANTS INTEND TO REPLY ON AP-
PEAL AND DESIGNATION OF RECORD
ON APPEAL.

Appellants intend to rely on the following points on appeal of the above-entitled cause.

The District Court of the United States for the Northern District of California, Northern Division, erred in denying relief to appellants and entering summary judgment for appellees and in the following particulars:

A. The Court erred in concluding that the United States, having selected the forum for the determination of its rights to acquire the property of appellants, had the authority to abandon that election in part.

B. The Court erred in ignoring the implications set forth in the affidavits and exhibits filed with and accepted by the Court on behalf of appellees.

C. The Court erred in failing and neglecting to recognize the fact that a mining location existing for more than five years and upon which no proceedings were ever instituted by the Federal Government to set the same aside, was, and is a vested estate until so set aside or cancelled.

D. The Court erred in concluding the Bureau of Land Management was a proper and lawful body

or tribunal to determine the validity of the mining locations and claims herein involved, when the Department of the Interior had already prejudged the validity thereof.

E. The Court erred in concluding that the United States could at will, during the pendency of an action before the Court, change its forum, modify its claims to the detriment of a defendant, and thereby fail to follow the concept of due process of law.

F. The Court erred in concluding the only purpose of the condemnation suit by the Federal Government involving appellants' mining locations and claims was to obtain immediate possession of the same, thus denying the right of appellants to have the value of the property determined by a jury.

L. G. The Court erred in granting appellees a summary judgment where the following were justiciable issues:

1. Appellants alleged in their verified complaint that each of the thirteen mining claims set forth and described therein included lands of established and known mineral character upon which as to each separate claim a discovery of gold had been made, and that each of the said claims had been held and worked by extensive excavations for their valuable gold content.

2. That appellants alleged in their verified complaint that the actions therein set forth by appellees would result in a multiplicity of suits.

3. That appellants alleged in their verified complaint that the actions of the appellees would require appellants to enter in upon prolonged and useless litigation and cause appellants to submit wholly to an unlawful exercise of attempted jurisdiction on the part of appellees.

Appellants designate all of the record on file herein as being material to consideration of this appeal.

Dated September 8, 1960.

Respectfully submitted,

/s/ CHAS. L. GILMORE,

Attorney for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed September 8, 1960.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas the above-named plaintiffs have filed in the District Court of the United States of America for the Northern District of California, Northern Division, a notice of appeal to the United States Court of Appeals for the Ninth Circuit, from a judgment of said District Court entered July 13,

1960, in that certain action as entitled above and numbered therein Civil 8076.

Now, Therefore, The Fidelity and Casualty Company of New York, a corporation duly organized and existing under the laws of the State of New York and duly licensed to transact a general surety business in the State of California, in consideration of the premises, undertakes for itself, its successors and assigns, in the sum of two hundred fifty and no/100 dollars (\$250.00), and promises that this bond is and shall be conditioned to secure the payment of all costs in the above action if for any reason the appeal is dismissed or if the judgment is affirmed, or of such costs as the Appellate Court may award if the judgment is modified, not exceeding the sum of two hundred fifty and no/100 dollars (\$250.00).

In testimony whereof, the said surety has caused these presents to be executed and its official seal affixed by its duly authorized attorney at Sacramento, California, on the 12th day of September, A.D. 1960.

[Seal] THE FIDELITY AND CASUALTY
COMPANY OF NEW YORK,

By /s/ A. I. CARRINGTON,
Attorney.

State of California,
County of Sacramento—ss.

On this 12th day of September, in the year one thousand nine hundred and sixty, before me, A. C. Lutz, a Notary Public in and for the said county and state, duly commissioned and sworn, personally appeared A. I. Carrington, known to me to be the attorney of The Fidelity and Casualty Company of New York, the Corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ A. C. LUTZ,
Notary Public in and for the County of Sacramento, State of California.

My commission expires April 29, 1961.

[Endorsed]: Filed September 12, 1960.

[Title of District Court and Cause.]

**CERTIFICATE OF CLERK TO
RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court
of the United States for the Northern District of

California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated.

Complaint.

Motion to vacate temporary restraining order to deny preliminary injunction and to dismiss in part.

Memorandum and order.

Summary judgment.

Notice of appeal.

Request to determine amount of cost and supersedeas bond.

Statement of points on which appellants intend to rely on appeal and designation of record on appeal.

Cost bond on appeal.

In witness whereof, I have hereunto set my hand and the seal of said Court this 15th day of September, 1960.

[Seal]

C. W. CALBREATH,

Clerk;

By /s/ C. C. EVENSEN,

Deputy Clerk.

[Endorsed]: No. 17093. United States Court of Appeals for the Ninth Circuit. Humboldt Placer Mining Company, a Corporation, and Del de Rosier, Appellants, vs. Raymond R. Best, as State Supervisor, Bureau of Land Management, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: September 16, 1960.

Docketed: September '23, 1960.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

33 In United States Court of Appeals for the Ninth
Circuit

Before: CHAMBERS, JERTBERG and KOELSCH, Circuit Judges

Minute entry of argument and submission

April 14, 1961

This cause coming on for hearing, Mr. Charles L. Gilmore argued for the appellant, and Mr. A. Donald Mileur, Attorney, Department of Justice, argued for the appellee, thereupon the Court ordered the cause submitted for consideration and decision.

34 In United States Court of Appeals for the Ninth
Circuit

Before: CHAMBERS, JERTBERG and KOELSCH, Circuit Judges

Minute entry of order directing filing of opinion and filing and recording of judgment

August 18, 1961

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

35 In United States Court of Appeals for the Ninth
Circuit

No. 17093

HUMBOLDT PLACER MINING COMPANY, A CORPORATION, AND
DEL DE ROSIER, APPELLANTS

VS.

RAYMOND R. BEST, AS STATE SUPERVISOR, BUREAU OF LAND
MANAGEMENT, AND WALTER E. BECK, AS MANAGER, DISTRICT
LAND OFFICE, BUREAU OF LAND MANAGEMENT, DEPARTMENT
OF THE INTERIOR, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION*Opinion*

August 18, 1961

Before CHAMBERS, JERTBERG and KOELSCH, Circuit Judges

JERTBERG, Circuit Judge.

Appellants appeal from a summary judgment dismissing their complaint seeking injunctive relief against the appellees.

Jurisdiction of the district court is predicated on the alleged presence of a federal question. Title 28 U.S.C.A. Sections 1358 and 1331. The amount in controversy is alleged to exceed \$10,000. This Court has jurisdiction to review the judgment under Title 28 U.S.C.A. Sections 1291 and 1294.

It appears that on June 27, 1957, the United States of America, under its powers of eminent domain, filed an action in condemnation in the United States District Court for the Northern District of California, Northern Division, seeking to acquire title to or outstanding adverse interests in lands located in Trinity County, California, on part of which are located unpatented mining claims of which appellants claim to be the owners and to which they claim the right of possession. These mining claims are located upon public lands the paramount title to which is in the United States. On instructions from the Solicitor of the Department of the Interior, dated June 5, 1957, the district court in the condemnation proceedings issued to the United States a writ of possession.

On March 17, 1960 appellees, who are officials of the Bureau of Land Management, Department of the Interior, filed in the office of the Bureau of Land Management, at Sacramento, California, a government contest seeking an adjudication by the Bureau of Land Management of the validity of appellants' mining claims. Said government contest complaint alleged that the land embraced within appellants' mining claims is non-mineral in character and that minerals had not been found within the limits of the claims in sufficient quantities to constitute a valid discovery. Appellants were ordered to appear before the Bureau of Land Management in this contest proceedings.

Thereafter appellants instituted their action in the district court, seeking to enjoin and restrain the appellees from proceeding in any manner in connection with the alleged government contest complaint filed with the Bureau of Land Management on behalf of the government. In this complaint filed in the district court appellants alleged that they were the owners of the mining claims and that each of them included lands of established and known mineral character, upon which as to each separate claim a discovery of valuable mineral has been made and that each of them has been and is held and worked by extensive excavation for its valuable gold content. Appellants further alleged that the appellees in proceeding with said government contest were acting in excess of authority in that, because of the pendency of the condemnation action, the administrative proceedings will result in a multiplicity of suits and that the appellants will be subjected to prolonged litigation, and that the settlement and determination of all questions of title are wholly and entirely within the exclusive jurisdiction of the district court in the condemnation proceedings.

Appellees filed no answer to the complaint filed by appellants in the district court, but in response to the court's
 37 order to show cause why a preliminary injunction should not be issued moved the district court to vacate a temporary restraining order previously issued, and moved the district court to dismiss the complaint. The district court treated the motion of appellees as a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Following a hearing, a summary judgment in favor of appellees was entered.

Absent the filing and the pendency of the condemnation action, appellants concede that the United States may initiate a contest proceeding before the Bureau of Land Management for the purpose of having adjudicated the legality and validity of an unpatented mining claim on public land. Such is undoubtedly the law. See *Cameron v. United States*, (1920), 252 U.S. 450.

The United States, plaintiff in the condemnation proceedings, is not a party to the instant case. The appellees (defendants in the district court) are subordinate officials of the Bureau of Land Management of the Department of the In-

terior. While we are not advised whether the district court has deferred further proceedings in the condemnation action pending the final determination of the administrative proceedings, it is clear from the following language of the district court's opinion in the instant case that such action will be taken. In the opinion of the district court *Humboldt Placer Mining Company and Del De Rosier v. Raymond R. Best, etc.*, 185 F. Supp. 290, he stated:

"Harmful multiplicity of litigation will not be involved, for the issues raised in the contest will not be tried by this Court in the condemnation cases. Until the resolution of the contests, the question of who, if anybody, is entitled to just compensation will be held in abeyance."

It is not disputed that a valid mining claim on public land, though unpatented, is an interest in real property which cannot be taken from the owner thereof under the power of eminent domain except upon the payment of just compensation. *North American Transportation & Trading Company v. United States*, (1918), 53 Ct. Cls. 424, affirmed (1920) 253 U.S. 330;

Phillips v. United States (9th Cir. 1957), 243 F.2d. 1. 38

The complaint in condemnation was filed in the district court on behalf of the United States by the Attorney General of the United States, at the instance and direction of the Solicitor of the Department of the Interior, exercising the authority of the Secretary of the Interior, pursuant to the provisions of Title 40 U.S.C.A. § 257.

The district court has jurisdiction of a condemnation action.¹ Inherent in the condemnation proceedings is the issue of the validity of appellants' mining claims. If valid, the appellants

¹ § 257. Condemnation of realty for sites and other uses

"In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice."

² Title 28 U.S.C.A. § 1358. "Eminent domain

"The district courts shall have original jurisdiction of all proceedings to condemn real estate for the use of the United States or its departments or agencies."

are entitled to just compensation for the taking thereof. If invalid, appellants have no compensable interest therein. The jurisdiction of the district court to determine the validity of the mining claims on public lands is not questioned. See *United States v. Schultz*, (9th Cir. 1929), 31 F. 2d 764.

If any doubt should exist as to whether the validity of the mining claims was put in issue in the condemnation proceedings, such doubt is removed by the allegation contained in the condemnation complaint wherein it is alleged that the plaintiff is the owner of the lands upon which the mining claims are located and that each of the mining claims is invalid. While we recognize that neither the filing of the condemnation action nor the order for immediate possession obtained therein constitutes any admission by the plaintiff as to the validity of

the mining claims—see *United States v. 93,970 Acres of*

39 Land, et al. (1959), 360 U.S. 328—nevertheless, the issue of validity of the mining claims is not removed from the condemnation action on the mere allegation that the mining claims are invalid.

Thus it is clear to us that the Secretary of the Interior did not resort to the condemnation action solely for the purpose of obtaining possession of the lands upon which the mining claims are located, and it is equally clear to us that the Secretary elected to put into issue in the condemnation action the validity of the mining claims.

After 44 months, during which the issue of validity was before the district court in the condemnation action, and during which, by virtue of writ of possession granted by the district court to the plaintiff at the instance and request of the Secretary of the Interior, the plaintiff was and still is in possession of the lands upon which the mining claims are located, and during which the appellants, who do not contest the right and power of the plaintiff to condemn their claimed valid mining claims, were presumably waiting trial on the issues involved in the condemnation action, the Secretary of the Interior, through his subordinates, initiated the administrative proceedings whereby he seeks to select another forum in which to adjudicate the validity of the mining claims.

The broad question presented by this appeal is whether the district court erred in refusing to enjoin appellees from proceeding further in the administrative proceedings, and in stating that the condemnation proceedings will be held in

abeyance pending the final decision of the administrative tribunal.

The effect of the district court's action is to require appellants to depart from the district court and undergo litigation in an administrative tribunal on one of the issues before the district court in the condemnation proceedings. If the decision is adverse to the appellants, the appellants must exhaust their administrative remedies before seeking judicial review of such decision. See *Adams v. Witmer*, 69th Cir. 1959, 271 F. 2d 29; Title 5 U.S.C.A. § 1009. Included in the administrative remedy is an appeal to the Secretary of the Interior. Title 43, Code of Federal Regulations

§ 221.31. The Solicitor of the Department of the Interior may exercise all of the authority of the Secretary of the Interior with respect to the disposition of appeals to the Secretary from the decisions of the Director of the Bureau of Land Management [or his delegates]. Order No. 2509, 17 Federal Register 6794, Section 23. The Solicitor is the official at whose direction the condemnation action was filed by the Attorney General on behalf of the United States, and in which it is alleged that appellants' mining claims are invalid. An adverse decision before the administrative tribunal may require appellants to proceed to this Circuit. See *Adams v. Witmer*, supra.

On the other hand, if the administrative decision should be in favor of appellants, appellants must return to the district court in order to have determined the issue of just compensation to which appellants may be entitled, which issue is beyond the power and jurisdiction of the administrative tribunal.

In *Humboldt Placer Mining Company v. Best*, supra, the district court stated:

"The affidavits and exhibits filed by defendants in this case disclose that the purpose of the filing of the condemnation suits was to get immediate possession. No authority, or rea-

¹ 43 Code of Federal Regulations.

² § 221.31. Right of appeal to the Secretary of the Interior. Any party adversely affected may appeal to the Secretary of the Interior from a final decision of the Director, whether such final decision is on an appeal or is an original decision, except from such a decision which, prior to promulgation, has been approved by the Secretary. No appeal, however, may be taken from a decision of the Director affirming a decision of a subordinate official of the Bureau in any case where the party adversely affected shall have failed to appeal from the decision of such official."

son, is advanced by plaintiffs which will support the proposition that such suits constitute an irrevocable election of forum. It may be assumed that if the Government raised the issue of validity of the claims in this Court, and at the same time vexed plaintiffs by filing contest claims before the Bureau of Land Management, this Court would have power to protect its jurisdiction and to prevent harassment of plaintiffs by enjoining further prosecution of the contests. In fact, a failure to do so would likely constitute an abuse of discretion. (*Crosley Corporation v. Hazeltine Corporation*, 122 F. 2d 925).

41 But where a court has jurisdiction of an entire controversy, it may wait until a court or tribunal of more limited jurisdiction adjudicates the issues peculiarly within its competency, and then give binding effect to the decision of such court or tribunal. (*United States v. Eisenbeis*, 112 Fed. 190; *United States v. Adamant Co.*, 197 F. 2d 1; and *Sec. Railroad Comm'n. v. Pullman Co.*, 312 U.S. 496; and *Louisiana P. & L. Co. v. City of Thibodaux*, 360 U.S. 25).

While it is clear from other parts of the district court's opinion that in stating "the purpose of the filing of the condemnation suits was to get immediate possession," the court did not intend to foreclose appellants from a hearing on the issue of just compensation should the decision of the administrative tribunal be favorable, we believe, for the reason hereinabove stated, that the court was in error in stating that the issue of the validity of the mining claims are not raised in the condemnation proceedings.

It is made clear by the above quoted language from the decision of the district court, and the authorities therein cited, that the district court was of the view that there existed in the district court and the administrative tribunal concurrent jurisdiction to determine the issue of validity of the mining claims. In our view, the Secretary of the Interior invoked the jurisdiction of the district court to have such issue determined by the district court. We note that Rule 71A(h) of the Federal Rules of Civil Procedure provides that if an action involves the exercise of the power of eminent domain, and in the absence of any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation, that any party may have a trial by jury on the issue of just compensation by filing a demand therefor unless the court in its discretion orders determination of such issue

by a commission of three persons appointed by it. The concluding sentence of said section is, "Trial on all issues shall otherwise be by the court." No statute or controlling authority has been called to our attention indicating that the administrative tribunal, within the Department of the Interior retains jurisdiction to adjudicate the validity of mining claims after the Secretary of the Interior has invoked the jurisdiction of the district court by the filing of a condemnation action in which is raised the same issue.

42 Appellees rely on *United States v. Minnie Baker* 60 I.D. 241 (1948), a decision of the Solicitor of the Department of the Interior in which it was held that proceedings to condemn public land for military purposes and taking possession thereof by the government would not affect the authority of the Bureau of Land Management to adjudicate the validity of a mining claim located on the land taken. The only authority cited for such conclusion is *Cameron v. United States*, supra. The *Cameron* case does not support the decision of the Solicitor. Eminent domain proceedings were not involved in *Cameron*. The jurisdiction of the district court was not invoked until after the Land Department of the Department of the Interior had adjudicated that the mining claim of *Cameron* was invalid. When *Cameron* refused to surrender possession of his mining location, the United States instituted an action in the district court in the nature of trespass to eject and dispossess him.

The judgment of the district court is vacated and set aside and the cause remanded to the district court for further proceedings consistent with the views herein expressed.

[File endorsement omitted.]

43 In United States Court of Appeals for the Ninth
Circuit

No. 17093

HUMBOLDT PLACER MINING COMPANY, A CORPORATION, AND
DEL DE ROSIER, APPELLANTS

v.

RAYMOND R. BEST, AS STATE SUPERVISOR, BUREAU OF LAND
MANAGEMENT, ET AL., APPELLEES

Judgment

Filed and entered August 18, 1961

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is vacated and set aside and that this cause be and hereby is remanded to the District Court for further proceedings consistent with the views herein expressed.

[File endorsement omitted.]

44 [Clerk's certificate to foregoing transcript omitted
in printing.]

45 Supreme Court of the United States

No. October Term, 1961

[Title omitted.]

Order extending time to file petition for writ of certiorari

November 15, 1961.

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Dec. 16, 1961.

WM. O. DOUGLAS,

*Associate Justice of the Supreme
Court of the United States.*

Dated this 15th day of November 1961.

42 HUMBOLDT PLACER MINING CO. ET AL. v. R. R. BEST ET AL.

46 Supreme Court of the United States

No. 611, October Term, 1961

RAYMOND R. BEST, ET AL., PETITIONERS

v.

HUMBOLDT PLACER MINING COMPANY, ET AL.

Order allowing certiorari

February 19, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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<i>United States v. Western Pacific R. Co.</i> , 352 U.S. 59	13, 14

Statutes and Rule:

R.S. 441, 5 U.S.C. 485	2, 7
R.S. 2478, 43 U.S.C. 1201	2, 7
Rule 71A(h), F.R. Civ. P.	3, 8, 16, 17
30 U.S.C. 22, 26, and 28	6
30 U.S.C. 29	8
40 U.S.C. 257	12

Miscellaneous:

43 C.F.R. § 185.1, <i>et seq.</i>	6
43 C.F.R. (1961) §§ 221, 221.67	7
43 C.F.R. (1961) § 221.51	8
Quarterly Report of the Director of the Administrative Office of the United States Courts, Third Quarter, 1961	18

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. —

RAYMOND R. BEST, ET AL., PETITIONERS

v.

**HUMBOLDT PLACER MINING COMPANY
AND DEL DE ROSIER**

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

The Solicitor General, on behalf of Raymond R. Best, as State Supervisor, Bureau of Land Management, and Walter E. Beck, as Manager, District Land Office, Bureau of Land Management, Department of the Interior, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the district court (R. 17-21) is reported at 185 F. Supp. 290. The opinion of the court of appeals (App. A, *infra*, pp. 20-29) is reported at 293 F. 2d 553.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1961 (App. B, *infra*, p. 30). On November 15, 1961, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including December 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the filing of a suit by the United States to condemn mining claims in public lands deprives the Secretary of the Interior of his authority to conduct a subsequently-instituted administrative proceeding to determine the validity of such claims.¹

STATUTES AND RULE INVOLVED

R.S. 441, 5 U.S.C. 485, provides in pertinent part:

The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:

* * * * *

4. Bureau of Land Management.

* * * * *

13. Public lands, including mines.

R.S. 2478, 43 U.S.C. 1201, provides as follows:

The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.

¹ A related question is presented in *Duquid v. Best*, No. 349, now pending on petition for certiorari.

Rule 71A(h) of the Federal Rules of Civil Procedure provides as follows:

If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (c) of Rule 53. Trial of all issues shall otherwise be by the court.

STATEMENT

This case originated with the filing of a complaint by the respondents, Humboldt Placer Mining Company and De Rosier, for an injunction to restrain

the officers of the Department of the Interior from proceeding with an administrative determination of the validity of respondents' mining claims. The facts are not in dispute.

In June 1957, the United States brought a condemnation action in the United States District Court for the Northern District of California in order to obtain immediate possession of and title to any outstanding mining interests in certain federally owned land which was needed for the construction of the Trinity River Dam and Reservoir in California.² The respondents claim to own valid unpatented mining claims upon this land. By an amendment to the complaint the United States reserved jurisdiction to determine the issue of the validity of the mining claims in administrative proceedings conducted by the Bureau of Land Management of the Department of the Interior (R. 22). The district court has issued to the United States a writ of possession, but all other issues in the condemnation action are still pending in the district court.

In March 1960, officials of the Department of the Interior filed in the local office of the Bureau of Land Management at Sacramento, California, an amended complaint seeking an administrative determination of the validity of respondent's mining claims (R. 10).³ No hearing upon the validity of the claims had been held in the district court, and none was then in process.

² *United States v. 3563.17 Acres* (N.D./Cal.) No. 7570.

³ The original complaint, which is not included in the record of the present litigation, was filed in May of 1958.

Respondents, who were ordered to appear before the Bureau of Land Management to take part in this determination, thereupon brought the present action for an injunction against the administrative proceedings, alleging that these proceedings were in derogation of the jurisdiction of the district court and would subject the respondents to a multiplicity of suits (R. 3). The proceeding was heard by the same district judge who was sitting in the pending condemnation action.

The district court granted summary judgment for the United States (R. 21). The court noted that the United States had reserved jurisdiction to determine the validity of respondents' claims in administrative proceedings and held that there was no evidence of harassment of the respondents since the government's purpose in filing the condemnation action prior to instituting administrative proceedings was only to obtain immediate possession of the land. "No authority, or reason," it held, "will support the proposition that such suits constitute an irrevocable election of forum" (R. 18). Finally, the district court recognized that there were both precedent and substantial reasons for it to stay its hand on the issue of validity of mining claims in order to allow a "tribunal of more limited jurisdiction" to adjudicate "the issues peculiarly within its competency (R. 19)."

The Court of Appeals for the Ninth Circuit reversed. It held that, since the question of title, which is necessarily involved in any condemnation action, was brought into issue by the complaint filed by the United States in the district court, the Secretary of

the Interior had elected to forgo administrative determination of this issue. In addition, the court suggested that in its view Rule 71A(h) of the Federal Rules of Civil Procedure prevents the condemnation court from allowing any other court or administrative agency to determine the issue of title to condemned property.

REASONS FOR GRANTING THE WRIT

This case presents an important question of first impression relating to the respective jurisdictions of the district court and the Department of the Interior to determine the validity of mining claims on public lands condemned by the United States. The court of appeals held that the government's filing of an action to condemn such claims ousts the Secretary of the Interior of his usual authority to adjudicate them, and that the district court cannot even permit the Secretary to conduct an administrative proceeding for such adjudication. The holding, ~~with~~ ^{which} overturns a settled administrative practice of many years standing, is not only without support in judicial authority but is contrary to the reasoning of the pertinent decisions of this Court and will, unless reversed, have a significant impact upon a large number of pending and future condemnation cases which involve questions as to the validity of mining claims on public lands.

Under the provisions of 30 U.S.C. §§ 22, 26, and 28 and the implementing federal regulations, 43 C.F.R. § 185.1 *et seq.*, persons may obtain the rights to possession of public land and to the removal and use of

minerals found on this land by discovering a valuable mineral deposit, complying with the procedural requirements for making a "location", and devoting at least \$100 worth of labor or improvements to the claim each year. The interest thus obtained, though less than a patent interest in fee, is a valid property right enforceable against both the government and third parties and compensable if taken by the government. Mining claims on public lands are recorded locally, and not with the Department of the Interior.

Since no notice to the federal government is requisite to perfect such a property interest in what has been public land, regulations authorized by the statute⁴ and codifying what has long been the practice as to mineral claims furnish a procedure by which the government may challenge the validity of any such claim.⁵ A "contest" is initiated by the Manager of the local land office of the Department of the Interior and heard before a trial examiner. There are appropriate provisions for notice and a hearing which includes the right of full cross-examination of witnesses. Appeals from the examiner's decision may be taken to the Director of the Bureau of Land Management and from the Director to the Secretary of the Interior. At each step of these hearings the Department of the Interior must comply with the requirements of the Administrative Procedure Act. *United States v. O'Leary*, 63 I.D. 341. Any person adversely affected

⁴ 5 U.S.C. 485; 43 U.S.C. 1201.

⁵ 43 C.F.R. (1961) §§ 221, 221.67; see *Cameron v. United States*, 252 U.S. 450.

by the action of the Department of the Interior is entitled to judicial review. See, e.g., *Foster v. Seaton*, 271 F. 2d 836 (C.A.D.C.). It is this system of administrative determination and ultimate judicial review which provides the basic framework for the determination of the validity of a mining claim on federally owned lands.* The regularity and frequency with which it is used are indicated by the fact that in connection with the single dam and reservoir project out of which the present suit arose, 6,200 unpatented mining claims have been processed by the Sacramento Regional Office of the Department of the Interior.

The Ninth Circuit's holding that the United States may not utilize this long established administrative procedure for determining the validity of mining claims once it has filed a condemnation action is based partly upon an erroneous application of the doctrine of election of remedies and partly upon a misinterpretation of Rule 71A of the Federal Rules of Civil Procedure. The results of the Ninth Circuit's decision are (1) to impose upon the government the dilemma of either foregoing the immediate possession of land required for public use or else abandoning the traditional and expeditious method of determining the validity of mining claims by the Department of the Interior; (2) to prevent the reference to an experienced and expert administrative body of questions relating to mining claims not within the general experience of the district courts; (3) to impose an unde-

* The validity of the claim may also be determined in a proceeding instituted by a third party claiming adversely to the claimant, 43 C.F.R. 221.51 (1961), and in a proceeding initiated by the claimant himself in order to obtain a patent for the land claimed, 30 U.S.C. 29.

gable burden of very substantial proportions upon the district courts; and (4) to unsettle a multitude of mineral claims that the parties have regarded as finally determined by the Department of the Interior. To avoid these results is a matter of substantial importance meriting the granting of the writ of certiorari.

1. In *United States v. 93,970 Acres*, 360 U.S. 328, it was argued that the United States waived its right to deny the claimant's interest in certain property by bringing an action to condemn the same interest. The Court rejected this contention holding that the doctrine of election of remedies does not force the government to choose between abandoning its contention that the adverse claimant had no rights in the property and giving up its right to obtain immediate possession under condemnation law. The Court stated (360 U.S. at 332):

We see no reason either in justice or authority why such a Hobson's choice should be imposed and why the Government should be forced to pay for property which it rightfully owns merely because it attempted to avoid delays which the applicable laws seek to prevent. Such a strict rule against combining different causes of action would certainly be out of harmony with modern legislation and rules designed to make trials as efficient, expeditious and inexpensive as fairness will permit.

While *United States v. 93,970 Acres* involved the necessity of foregoing substantive rights if a condemnation action is brought and not, as here, the necessity of foregoing the usual procedure for having these

rights determined, the underlying principle is unquestionably the same in both cases.

Under the ruling below the customary administrative procedure for contesting mining claims can no longer be used by the government in any case in which immediate possession of the land is necessary to a government project. The mere filing of a condemnation action, which is a prerequisite to obtaining immediate possession, was held to constitute an irrevocable election to have the issue of title decided by the district court. But the United States has not in any realistic sense chosen to submit the issue of title to the district court. As the district court held (R. 22):

In the condemnation cases here involved the purpose of the suit was to obtain immediate possession of the lands, and the Government has not raised therein the issue of validity of the mining claims concerned; on the contrary, it has specifically asserted its right to retain jurisdiction of this issue for determination by the Bureau of Land Management.

Thus, the Ninth Circuit could not have found an election of remedies as a matter of choice but only as a rule of law applicable to the government's attempt to obtain immediate possession by bringing the condemnation action regardless of the government's intention.

This ruling imposes upon the government in a case such as this a Hobson's choice similar in all material respects to that condemned in *United States v. 93,970 Acres*. In both cases the government could have proceeded to determine the issue of title prior to bringing a condemnation action, but only at the

expense of foregoing immediate possession. In both cases a condemnation action was appropriate because, if the issue of validity of title were determined against the government, the government would still wish to take the property involved, paying the just compensation determined in the condemnation proceeding. In *United States v. 93,970 Acres* this Court declared that no mere inconsistency of pleadings prevents the United States from asking a district court both to resolve the question of title and to determine the amount of compensation required for the taking if title is in the defendant. There is no greater reason why the United States should be precluded from asking the district court both to allow an administrative tribunal to determine the question of title and then itself to determine the amount of compensation required for the taking if title is in the defendant.

In the present case there is an additional reason, not present in *United States v. 93,970 Acres*, why the doctrine of election of remedies should not be applied. With at least some superficial plausibility the Ninth Circuit could say that the Secretary of the Interior "elected to put into issue in the condemnation action the validity of the mining claims" (App. A, p. 25), for here, coincidentally, the same Department that was authorized to determine the validity of mining claims had instituted the condemnation action. But the statutory authority under which the Secretary of the Interior instituted the condemnation action is also available to officers of the other government depart-

ments." If the mere filing of a complaint in condemnation constitutes the "election" found by the Ninth Circuit, then an election would equally be made in condemnation suits brought by the Attorney General at the request of the Secretaries of the Army, Navy, Air Force, Agriculture, or any other governmental official.⁷ Yet obviously none of these officials has the authority to "elect" to waive the jurisdiction of the Secretary of the Interior to determine the validity of claimed mineral interests in public lands. The result of the Ninth Circuit's opinion is either to bestow upon other government officials the power to waive the Secretary of the Interior's jurisdiction or unjustifiably to impose upon the Secretary of the Interior a condition of obtaining immediate possession of land which cannot be imposed upon the officers of any other governmental department.

U.S.C. S. 257 provides:

Condemnation of realty for sites and other uses; jurisdiction.

In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

⁷ In fact, such cases are now pending in the Southern District of California. See, e.g., *United States v. 32427194 Acres*, No. 769-60Y (temporary restraining order granted November 14, 1961, pending determination of this litigation.)

2. In holding that the filing of the condemnation action did not constitute an irrevocable choice of forum, the district court stated that "where a court has jurisdiction of an entire controversy, it may wait until a court or tribunal of more limited jurisdiction adjudicates the issues peculiarly within its competency, and then give binding effect to the decision of such court or tribunal" (R. 19). This statement is in accord with the settled practice under which federal courts have stayed the exercise of their jurisdiction in appropriate circumstances to enable either a state court⁹ or an administrative tribunal,¹⁰ to adjudicate issues peculiarly within its competency. This has been true of questions of state law in condemnation proceedings where the federal courts have stayed their hands pending litigation in the state courts on questions of state tax matters, and questions of local property law involving liens, leases, and reversions.¹⁰ It should be no less true of issues arising in condemnation cases that are within the particular competence of a federal administrative agency.

⁹ See, e.g., *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496; *Burford v. Sun Oil Co.*, 319 U.S. 315; *Louisiana Power & Light Co., v. City of Thibodaux*, 360 U.S. 25.

¹⁰ See, e.g., *Texas & Pacific Ry. v. American Tie Co.*, 234 U.S. 138; *United States v. Western Pacific R. Co.*, 352 U.S. 59; *Pennsylvania R. Co. v. United States*, 363 U.S. 202.

¹⁰ *United States v. Adamant Co.*, 197 F. 2d 1, 12 (C.A. 9); *United States v. 25.946 Acres, Bergen County, N.J.*, 153 F. 2d 277 (C.A. 3); *Florida Beaches v. Niagara Inv. Co.*, 148 F. 2d 963 (C.A. 5); *United States v. 150.29 Acres in Milwaukee, Wisc.*, 135 F. 2d 878 (C.A. 7); *United States v. Eisenbeis*, 112 Fed. 190 (C.A. 9); *United States v. 70.39 Acres of Land*, 164 F. Supp. 451, 481 (S.D. Cal.).

This Court has pointed out that:

• • • in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.¹¹

It is arguable that a district court is required to refer to the Interior Department questions as to the validity of unpatented mining claims that arise in federal condemnation suits. But in any event, a district court plainly has discretion to permit the litigation before the Department of such of those questions as it deems appropriate for the exercise of the Department's expert skill and knowledge.

The determination of the issue of validity of an unpatented mining claim turns upon the application of such statutory or regulatory requirements as dis-

¹¹ *Far East Conference v. United States*, 342 U.S. 570, 574-575; see also *United States v. Western Pac. R. Co.*, 352 U.S. 59, 64-65.

covery of a "valuable" mineral deposit, "such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success";¹² making an appropriate "location"; and maintaining the claim by complying with certain assessment work requirements of the statute. The application of these requirements to a particular mining claim involves both the exercise of highly specialized judgment on facts common only to mining claims¹³ and an understanding of the relationship of these requirements to the structure and purpose of the mining laws and the extensive regulations promulgated by the Department of the Interior.¹⁴ It is therefore not only permissible but highly desirable that, under ordinary circumstances, the district court allow a referral of the issue of validity of mining claims to the Department of the Interior.

In the present case, the district court was fully justified in concluding (R. 19) that "there is every

¹² *Castle v. Womble*, 19 I.D. 455, 457.

¹³ Factual questions which must be resolved in order to determine the validity of mining claims include: the value of the various grades of mineral found; the likely quantity of the mineral discovered; where markets for specific minerals are located and the costs of transportation; the cost of mining and development work; the mining equipment needed for successful operations and its cost; whether the claim is properly classified as a placer or lode claim. In addition, customs of miners become relevant to the determination of such questions as: which of competing claimants made a prior claim and what is the physical extent of a claim (e.g., how far a claimant is entitled to follow a particular vein).

¹⁴ See, e.g., *Foster v. Seaton*, 271 F. 2d 836, 838 (C.A.D.C.).

reason to allow the issues of the contests to be resolved by the administrative agency, with its special experience and expertise in these matters." As the court pointed out (R. 17), the government was challenging the validity of the mining claims on the grounds that the land involved is nonmineral in character, and that minerals have not been found in sufficient quantities to constitute a valid discovery (see R. 14). These are issues coming within the "special competency and administrative experience" of the "Bureau of Land Management * * * in the hearing of contests of claims relating to the public lands" (R. 19). Particularly in view of the rule that courts ordinarily are precluded from enjoining the conduct of administrative proceedings (see, e.g., *Macauley v. Waterman Steamship Corp.*, 327 U.S. 540), the court of appeals erred in overturning the district court's decision to permit the administrative proceedings before the expert agency to go forward.

The Ninth Circuit's reliance on Rule 71A(h) of the Federal Rules of Civil Procedure to preclude reference of the issue of validity of the mining claim to the Department of the Interior is completely misplaced. For its interpretation of the Rule as requiring the district court to decide all the issues in the condemnation suit would also preclude reference of questions of state law to appropriate state tribunals. This reading of Rule 71A(h), which is in conflict with the views of the many courts which have stayed their condemnation actions to allow matters of state law to be tried in state courts,¹³ is wholly un-

¹³ See notes 8, 10, *supra*.

warranted. The twofold purpose of Rule 71A(h) was (1) to specify the conditions on which trial of the issue of just compensation was to be to a commission rather than to a jury and (2) to allocate between the court, on the one hand, and the jury or commission, on the other, the determination of relevant issues. It is to the latter problem that the last sentence of the subsection is addressed: "Trial of all issues shall otherwise be by the court." There was plainly no purpose of limiting the court's recourse to state tribunals or administrative agencies on appropriate questions. The full intent and effect of the quoted sentence was to foreclose any argument that there is a right to jury trial on issues other than just compensation.

3. The Ninth Circuit's decision affects the course of proceedings in a vast number of cases, for a great part of the western public domain is subject to mining claims, most of which are dormant but the validity of which can be determined only by investigating each individual case. The United States Attorney for the Southern District of California has advised that in that district alone over 2,200 mining claims are involved in pending condemnation litigation. Some indication of the volume of litigation affected in the Northern District of California may be obtained from the fact that the Sacramento Regional Office of the Department of the Interior has processed some 6,200 unpatented mining claims on the single project that gives rise to the present litigation. Over 2,000 of these were included in condemnation proceed-

ings. Each of these mining claims involves a separate case determined on the basis of its own particular facts.

This massive volume of litigation has a significance even more far-reaching than its bearing upon the importance of the Ninth Circuit's errors in denying the government the use of customary administrative proceedings when it must obtain immediate possession and in precluding the district court from allowing a reference of a limited and technical issue to a more expert tribunal. A very substantial additional workload will be imposed upon district courts in any area within the Ninth Circuit where the government proceeds to obtain immediate possession of land by filing a condemnation action since under the decision below the district court, rather than the Department of the Interior will have to adjudicate the mining claims. The significance of this burden can be appreciated by comparing the 1,682 cases of all types which were pending in the Northern District of California at the close of the third quarter of the fiscal year of 1961¹⁶ with the 2,000 unpatented mining claims included in condemnation actions that were processed by the Sacramento Regional Office of the Department of the Interior in connection with the project involved in the present case alone.

4. Finally, the decision below casts a cloud upon the literally thousands of prior administrative proceedings that have been initiated and concluded during

¹⁶ Table C-1, Quarterly Report of the Director of the Administrative Office of the United States Courts.

the course of a condemnation action in a federal court. The district courts in the Ninth Circuit have allowed the United States to dismiss numerous condemnation actions against claimants of mineral rights whose claims have been rejected in a full administrative proceeding. It is by no means clear that these claimants will be barred by doctrines of *res judicata* from reopening the question of title in the district courts on the basis of an allegation that under the Ninth Circuit's decision the Department of the Interior lacked jurisdiction to determine the validity of their mining claims.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General.

ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys.

DECEMBER 1961.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17,093. Aug. 18, 1961

**HUMBOLDT PLACER MINING COMPANY, A CORPORATION,
AND DEL DE ROSIER, APPELLANTS**

vs.

**RAYMOND R. BEST, AS STATE SUPERVISOR, BUREAU OF
LAND MANAGEMENT, AND WALTER E. BECK, AS MAN-
AGER, DISTRICT LAND OFFICE, BUREAU OF LAND MAN-
AGEMENT, DEPARTMENT OF THE INTERIOR, APPELLEES**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN
DIVISION**

Charles L. Gilmore for appellants.

A. Donald Mileur, Attorney, Department of Justice
[with him on the brief were *J. Edward Williams*,
Acting Assistant Attorney General; *Laurence E. Day-
ton*, United States Attorney, and *J. Harold Weise*,
Assistant United States Attorney, San Francisco,
California; and *S. Billingsley Hill*, Attorney, De-
partment of Justice], for appellees.

Before CHAMBERS, JERTBERG and KOELSCH, *Circuit
Judges.*

JERTBERG, Circuit Judge.

Appellants appeal from a summary judgment dis-
missing their complaint seeking injunctive relief
against the appellees.

Jurisdiction of the district court is predicated on the alleged presence of a federal question, Title 28 U.S.C.A. Sections 1358 and 1331. The amount in controversy is alleged to exceed \$10,000. This Court has jurisdiction to review the judgment under Title 28 U.S.C.A. Sections 1291 and 1294. /

It appears that on June 27, 1957, the United States of America, under its powers of eminent domain, filed an action in condemnation in the United States District Court for the Northern District of California, Northern Division, seeking to acquire title to or outstanding adverse interests in lands located in Trinity County, California, on part of which are located unpatented mining claims of which appellants claim to be the owners and to which they claim the right of possession. These mining claims are located upon public lands the paramount title to which is in the United States. On instructions from the Solicitor of the Department of the Interior, dated June 5, 1957, the district court in the condemnation proceedings issued to the United States a writ of possession.

On March 17, 1960 appellees, who are officials of the Bureau of Land Management, Department of the Interior, filed in the office of the Bureau of Land Management, at Sacramento, California, a government contest seeking an adjudication by the Bureau of Land Management of the validity of appellants' mining claims. Said government contest complaint alleged that the land embraced within appellants' mining claims is non-mineral in character and that minerals had not been found within the limits of the claims in sufficient quantities to constitute a valid discovery. Appellants were ordered to appear before the Bureau of Land Management in this contest proceedings..

Thereafter appellants instituted their action in the district court, seeking to enjoin and restrain the appellees from proceeding in any manner in connection with the alleged government contest complaint filed with the Bureau of Land Management on behalf of the government. In this complaint filed in the district court appellants alleged that they were the owners of the mining claims and that each of them included lands of established and known mineral character, upon which as to each separate claim a discovery of valuable mineral has been made and that each of them has been and is held and worked by extensive excavation for its valuable gold content. Appellants further alleged that the appellees in proceeding with said government contest were acting in excess of authority in that, because of the pendency of the condemnation action, the administrative proceedings will result in a multiplicity of suits and that the appellants will be subjected to prolonged litigation, and that the settlement and determination of all questions of title are wholly and entirely within the exclusive jurisdiction of the district court in the condemnation proceedings.

Appellees filed no answer to the complaint filed by appellants in the district court, but in response to the court's order to show cause why a preliminary injunction should not be issued moved the district court to vacate a temporary restraining order previously issued, and moved the district court to dismiss the complaint. The district court treated the motion of appellees as a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Following a hearing, a summary judgment in favor of appellees was entered.

Absent the filing and the pendency of the condemnation action, appellants concede that the United States may initiate a contest proceeding before the Bureau of Land Management for the purpose of having adjudicated the legality and validity of an unpatented mining claim on public land. Such is undoubtedly the law. See *Cameron v. United States*, (1920), 252 U.S. 450.

The United States, plaintiff in the condemnation proceedings, is not a party to the instant case. The appellees (defendants in the district court) are subordinate officials of the Bureau of Land Management of the Department of the Interior. While we are not advised whether the district court has deferred further proceedings in the condemnation action pending the final determination of the administrative proceedings, it is clear from the following language of the district court's opinion in the instant case that such action will be taken. In the opinion of the district court *Humboldt Placer Mining Company and Del De Rosier v. Raymond R. Best, etc.*, 185 F. Supp. 290, he stated:

Harmful multiplicity of litigation will not be involved, for the issues raised in the contest will not be tried by this Court in the condemnation cases. Until the resolution of the contests, the question of who, if anybody, is entitled to just compensation will be held in abeyance.

It is not disputed that a valid mining claim on public land, though unpatented, is an interest in real property which cannot be taken from the owner thereof under the power of eminent domain except upon the payment of just compensation. *North American Transportation & Trading Company v. United States*, (1918), 53 Ct. Cls. 424, affirmed

(1920) 253 U.S. 330; *Phillips v. United States* (9th Cir. 1957), 243 F. 2d 1.

The complaint in condemnation was filed in the district court on behalf of the United States by the Attorney General of the United States, at the instance and direction of the Solicitor of the Department of the Interior, exercising the authority of the Secretary of the Interior, pursuant to the provisions of Title 40 U.S.C.A. § 257.¹

The district court has jurisdiction of a condemnation action.² Inherent in the condemnation proceedings is the issue of the validity of appellants' mining claims. If valid, the appellants are entitled to just compensation for the taking thereof. If invalid, appellants have no compensable interest therein. The jurisdiction of the district court to determine the validity of the mining claims on public lands is not questioned. See *United States v. Schultz* (9th Cir. 1929), 31 F. 2d 764.

¹ § 257. Condemnation of realty for sites and other uses

"In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice."

² Title 28 U.S.C.A. § 1358. "Eminent domain

"The district courts shall have original jurisdiction of all proceedings to condemn real estate for the use of the United States or its departments or agencies."

If any doubt should exist as to whether the validity of the mining claims was put in issue in the condemnation proceedings, such doubt is removed by the allegation contained in the condemnation complaint wherein it is alleged that the plaintiff is the owner of the lands upon which the mining claims are located and that each of the mining claims is invalid. While we recognize that neither the filing of the condemnation action nor the order for immediate possession obtained therein constitutes any admission by the plaintiff as to the validity of the mining claims—see *United States v. 93,970 Acres of Land, et al*, (1959), 360 U.S. 328—nevertheless, the issue of validity of the mining claims is not removed from the condemnation action on the mere allegation that the mining claims are invalid.

Thus it is clear to us that the Secretary of the Interior did not resort to the condemnation action solely for the purpose of obtaining possession of the lands upon which the mining claims are located, and it is equally clear to us that the Secretary elected to put into issue in the condemnation action the validity of the mining claims.

After 44 months, during which the issue of validity was before the district court in the condemnation action, and during which, by virtue of writ of possession granted by the district court to the plaintiff at the instance and request of the Secretary of the Interior, the plaintiff was and still is in possession of the lands upon which the mining claims are located, and during which the appellants, who do not contest the right and power of the plaintiff to condemn their claimed valid mining claims, were presumably waiting trial on the issues involved in the condemnation action, the Secretary of the Interior, through his subordinates, initiated the administrative

proceedings whereby he seeks to select another forum in which to adjudicate the validity of the mining claims.

The broad question presented by this appeal is whether the district court erred in refusing to enjoin appellees from proceeding further in the administrative proceedings, and in stating that the condemnation proceedings will be held in abeyance pending the final decision of the administrative tribunal.

The effect of the district court's action is to require appellants to depart from the district court and undergo litigation in an administrative tribunal on one of the issues before the district court in the condemnation proceedings. If the decision is adverse to the appellants, the appellants must exhaust their administrative remedies before seeking judicial review of such decision. See *Adams v. Witmer*, (9th Cir., 1959), 271 F. 2d 29; Title 5 U.S.C.A. § 1009. Included in the administrative remedy is an appeal to the Secretary of the Interior, Title 43, Code of Federal Regulations § 221.31.³ The Solicitor of the Department of the Interior may exercise all of the authority of the Secretary of the Interior with respect to the disposition of appeals to the Secretary from the decisions of the Director of the Bureau of Land Management [or his

³ 43 Code of Federal Regulations.

"§ 221.31 *Right of appeal to the Secretary of the Interior.* Any party adversely affected may appeal to the Secretary of the Interior from a final decision of the Director, whether such final decision is on an appeal or is an original decision, except from such a decision which, prior to promulgation, has been approved by the Secretary. No appeal, however, may be taken from a decision of the Director affirming a decision of a subordinate official of the Bureau in any case where the party adversely affected shall have failed to appeal from the decision of such official."

delegates]. Order No. 2509, 17 Federal Register 6794, Section 23. The Solicitor is the official at whose direction the condemnation action was filed by the Attorney General on behalf of the United States, and in which it is alleged that appellants' mining claims are invalid. An adverse decision before the administrative tribunal may require appellants to proceed to this Circuit. See *Adams v. Witmer*, *supra*.

On the other hand, if the administrative decision should be in favor of appellants, appellants must return to the district court in order to have determined the issue of just compensation to which appellants may be entitled, which issue is beyond the power and jurisdiction of the administrative tribunal.

In *Humboldt Placer Mining Company v. Best*, *supra*, the district court stated:

The affidavits and exhibits filed by defendants in this case disclose that the purpose of the filing of the condemnation suits was to get immediate possession. No authority, or reason, is advanced by plaintiffs which will support the proposition that such suits constitute an irrevocable election of forum. It may be assumed that if the Government raised the issue of validity of the claims in this Court, and at the same time vexed plaintiffs by filing contest claims before the Bureau of Land Management, this Court would have power to protect its jurisdiction, and to prevent harassment of plaintiffs, by enjoining further prosecution of the contests. In fact, a failure to do so would likely constitute an abuse of discretion. (*Crosley Corporation v. Hazeltine Corporation*, 122 F. 2d 925). But where a court has jurisdiction of an entire controversy, it may wait until a

court or tribunal of more limited jurisdiction adjudicates the issues peculiarly within its competency, and then give binding effect to the decision of such court or tribunal. (United States v. Eisenbeis, 112 Fed. 190; United States v. Adamant Co., 197 F. 2d 1; and See: Railroad Comm'n. v. Pullman Co., 312 U.S. 496; and Louisiana P. & L. Co. v. City of Thibodaux, 360 U.S. 25).

While it is clear from other parts of the district court's opinion that in stating "the purpose of the filing of the condemnation suits was to get immediate possession," the court did not intend to foreclose appellants from a hearing on the issue of just compensation should the decision of the administrative tribunal be favorable, we believe, for the reason hereinabove stated, that the court was in error in stating that the issue of the validity of the mining claims are not raised in the condemnation proceedings.

It is made clear by the above quoted language from the decision of the district court, and the authorities therein cited, that the district court was of the view that there existed in the district court and the administrative tribunal concurrent jurisdiction to determine the issue of validity of the mining claims. In our view, the Secretary of the Interior invoked the jurisdiction of the district court to have such issue determined by the district court. We note that Rule 71A (h) of the Federal Rules of Civil Procedure provides that if an action involves the exercise of the power of eminent domain, and in the absence of any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation, that any party may have a trial by jury on the issue of just compensation by filing a demand therefor un-

less the court in its discretion orders determination of such issue by a commission of three persons appointed by it. The concluding sentence of said section is, "Trial on all issues shall otherwise be by the court." No statute or controlling authority has been called to our attention indicating that the administrative tribunal within the Department of the Interior retains jurisdiction to adjudicate the validity of mining claims after the Secretary of the Interior has invoked the jurisdiction of the district court by the filing of a condemnation action in which is raised the same issue.

Appellees rely on *United States v. Minner Baker*, 60 I.D. 241 (1948), a decision of the Solicitor of the Department of the Interior in which it was held that proceedings to condemn public land for military purposes and taking possession thereof by the government would not affect the authority of the Bureau of Land Management to adjudicate the validity of a mining claim located on the land taken. The only authority cited for such conclusion is *Cameron v. United States*, supra. The *Cameron* case does not support the decision of the Solicitor. Eminent domain proceedings were not involved in *Cameron*. The jurisdiction of the district court was not invoked until after the Land Department of the Department of the Interior had adjudicated that the mining claim of Cameron was invalid. When Cameron refused to surrender possession of his mining location, the United States instituted an action in the district court in the nature of trespass to eject and dispossess him.

The judgment of the district court is vacated and set aside and the cause remanded to the district court for further proceedings consistent with the views herein expressed.

(Endorsed) Opinion Filed Aug. 18, 1961.

FRANK H. SCHMID, Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT

No. 17093

HUMBOLDT PLACER MINING COMPANY, A CORPORATION,
AND DEL DE ROSIER, APPELLANTS

v.

RAYMOND R. BEST, AS STATE SUPERVISOR, BUREAU OF
LAND MANAGEMENT, ET AL., APPELLEES

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is vacated and set aside and that this cause be and hereby is remanded to the Disfrict Court for further proceedings consistent with the views herein expressed.

(ENDORSED) Judgment Filed and Entered Aug. 18, 1961.

FRANK H. SCHMID, *Clerk.*

APPENDIX C

MINING CLAIMS INVOLVED IN PENDING LITIGATION— SOUTHERN DISTRICT OF CALIFORNIA

3129-PH	291 Unpatented Claims
769-60-Y	129 Not examined
(Mojave B Range)	55 Validated
	105 Unvalidated
	2 No decision
311-ND	598 Unpatented Claims
3472-ND	161 Validated
(Inyokern Naval Test Station)	437 Unvalidated
14018-PH, et al.	1,246 Unpatented Claims
(29 Palms Marine Base)	22 Validated
	1,113 Unvalidated
	111 No decision
14361-Y	2 Unvalidated
(Randsburg Wash Test Range)	1 No examination
1782-SD	55 Unpatented Claims
2426-SD	5 Validated
(Chocolate Mountain Aerial Gunnery Range)	11 Unvalidated
	39 No decision
19963-WB	66 Unpatented Claims
(Cuddeback Lake Air Force Range)	66 Unvalidated

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1961

No. 611

RAYMOND R. BEST and WALTER E.
BECK,

Petitioners,

vs.

HUMBOLDT PLACER MINING COMPANY,
and DEL DE ROSIER,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App.
A 20-29) is reported at 293 F.2d 553.

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1961 (Pet. App. B 30). No petition for rehearing was filed.

Petition for Writ of Certiorari was filed on December 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioners, as subordinate officers, where the United States has voluntarily submitted to the jurisdiction of a Federal Court by its complaint in eminent domain, can lawfully treat the District Court as a mere *forum non conveniens* and institute other *in rem* proceedings against respondents and yet bar respondents from operating their mines due to an outstanding writ of possession.

2. Whether a plea of a burdensome trial in the District Court is sufficient to justify an additional *in rem* action as an administrative proceeding and deny respondents their right to a jury trial in evaluating their mining properties.

STATUTES AND RULES INVOLVED

40 U.S.C.A. 258a provides in pertinent part:

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States

for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. . . .

28 U.S.C.A. 1358 provides:

The district courts shall have original jurisdiction of all proceedings to condemn real estate for the use of the United States or its departments or agencies.

28 U.S.C. (Federal Rules of Civil Procedure), Rule 71A(i), provides:

At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

STATEMENT

Respondents herein, as plaintiffs, brought this action (R. 3-16) in Federal District Court to enjoin petitioners, who are subordinate officials of the Department of the Interior, from removing from the

jurisdiction of the District Court an *in rem* action in eminent domain and subject the mining properties of respondents to a "contest" before its Bureau of Land Management.

Respondents alleged in the District Court that they are the owners of thirteen placer mining locations, the location notices thereof being duly recorded in the Recorder's Office of the County of Trinity, State of California. Each mining location is alleged to include lands of established and known mineral character upon which—as to each separate claim—a discovery of valuable mineral; to wit: gold, has been made and the said claims and each of them have been and are held and worked by extensive excavations for their valuable gold content, and that the value is in excess of \$10,000.00.

It is further alleged that the petitioners herein, in proceeding through the medium of said contest, were acting in excess of their statutory authority therefor, and the respondents herein would be required to enter in upon prolonged and useless litigation and submit themselves to an unlawful exercise of attempted jurisdiction on the part of the petitioners.

It is further alleged that the United States, named as contestant in said contest, is the plaintiff in the eminent domain proceedings and has selected the United States District Court as the proper forum to determine all questions involved in said contest, and that the said petitioners were invoking the power and sovereignty of the United States of America without any warrant or authority of law.

It will be noted that, among the allegations in said contest (R-13), the petitioners claim that, so far as known to the contestant (United States), there are no proceedings pending before the Department of the Interior for the acquisition of title to or any interest in such lands on behalf of any party other than contestees (respondents herein).

The District Court, granted a temporary restraining order (R-17) on April 18, 1960, and on June 21, 1960 entered its order (R-17) vacating and dissolving the temporary restraining order, and that the complaint be dismissed. Thereafter and on June 11, 1960 the District Court entered its summary judgment of dismissal (R-22), stating therein that the purpose of the condemnation cases was to obtain immediate possession of the lands, and the Government has not raised therein the issue of the validity of the mining claims concerned.

ARGUMENT

The purpose of the eminent domain proceedings was to obtain, not only immediate possession of the lands, but to try the title to the premises of respondents. The error occurred in the summary judgment of the District Court (R-22) wherein, in Finding and Conclusion No. 4, the Court said:

"In the condemnation cases here involved, the purpose of the suit was to obtain immediate possession of the lands, and the Government has not raised therein the issue of validity of the mining claims concerned."

The Solicitor for the Department of the Interior, exercising his authority in accordance with law, did—as pointed out in the decision of the Court of Appeals, Appendix A, pages 20-29 (293 F.2d 553)—under date of June 5, 1957, in directing the United States Attorney General to institute these condemnation suits, state that the mining claims involved were invalid and thus put in issue in the District Court the question of the validity of the mining claims.

It will be noted in the decision of the Court of Appeals above referred to, that attention was called to the error of the District Court in stating that the issue of the validity of the mining claims was not raised in the condemnation proceedings.

None of the cases cited by petitioners support the claims of petitioners.

The Government itself, through its proper officers of the Department of the Interior, initiated the *in rem* proceedings in eminent domain in the District Court. In submitting itself to the jurisdiction of that Court for all purposes necessary to complete a determination of every question involved, it had submitted itself irrevocably to the jurisdiction of the District Court.¹

The argument tendered by petitioners as reasons for granting the writ (Pet. 6) is entirely misplaced.

¹*Jones v. Watts*, 142 F.2d 575, 577, 163 A.L.R. 240 (Cert. Den. 323 U.S. 787, 89 L.Ed. 628, 65 S.Ct. 310).

"It is well settled that when government invokes the aid of the court as a litigant it stands as any other litigant, with the same obligation to give effect to the rights of the person sued. It cannot ask the court to render a judgment or to enforce it without submitting itself to do justice."

See also *National Rag and Waste Co. v. U. S.*, 237 F.2d 846.

We submit the problem is not the overthrow of an administrative practice of many years' standing, but rather one that stops an attempted administrative procedure before it has an opportunity to take root. There is no authority under which an administrative board or bureau of limited authority, such as the Bureau of Land Management, can remove any part or parcel of an eminent domain proceeding from the Federal Court and take unto itself a piece of it for its own adjudication.

That this would be in violation of the Fifth Amendment is at once apparent.

By the institution of the action in eminent domain and the obtaining of a writ of possession, respondents have been deprived of their property pending adjudication of their rights by the Federal Court. Admittedly the Bureau of Land Management has no jurisdiction whatsoever over the writ of possession, so we have a split proceeding—partially in the Federal Court, partially in the Bureau of Land Management—and petitioners attempt to justify by some sort of legal legerdemain such a procedure (See e.g. *Phillips, et al. v. United States*, 243 F.2d 1). To respondents the theory is abhorrent to the established principles of justice under a constitution such as ours.

U.S. v. O'Leary and Moore, 63 I.D. 341, could not be authority for any points in this case. It was a contest of a mining location but there was no proceeding of any kind or character involving that mining claim pending before any Court. What was decided in that case was that hearings before the manager,

or any other officer, of the Land Department in mining cases was not authorized by law and that the Land Department would have to change its method of procedure by strained interpretation of some cases, particularly the *Cameron* case.²

However, that case would not be authority for the *O'Leary* case, nor would it be authority here. The *Cameron* case had to do with proceedings in a hearing before the register of the Land Office in which there was no objection made by the contestee. He participated in the hearing, carried his appeal all the way through to the Secretary, and the case was finally decided against him, holding his claim to be non-mineral in character. Thereafter, when the United States sought to oust him, he endeavored to hold to the property by raising the question of the character of the land. This Honorable Court decided that he had submitted himself to the jurisdiction of the Land Department and was bound by that administrative ruling.

There is no such parallel here.

Following the *O'Leary-Moore* decision by the Secretary of the Interior, the Department made an attempt to comply with the Administrative Procedure Act.³ This act provides, among other things, that in case of an adjudication required by statute to be determined on the record after opportunity for an agency hearing, it must comply with the procedure laid

²*Cameron v. U. S.*, 252 U.S. 450.

³5 U.S.C. 1001 et seq.

out in Sec. 5 and, further, that no officer shall preside at the reception of evidence at hearings covered by Sec. 5a of the Act if such officer is responsible to or subject to the supervision or direction of any officer, employe or agent engaged in the performance of investigation or prosecuting functions for the agency.

Notwithstanding the ruling of the Secretary of the Interior, which was correct, that there was no statutory requirement for a hearing in contest cases involving the validity of a mining claim, the Department proceeded to create an office of Hearing Examiner. The Hearing Examiner is an employe of the Bureau of Land Management or the Department of the Interior and he is subject to the will of the Secretary, as any other employe. In a hearing such as petitioners would like to impose upon respondents herein, the person who signs the complaint in the contest is an employe of the Bureau of Land Management; the witnesses who testify for the Bureau are all employes; the prosecuting attorney for the Government is an assistant solicitor and his superior officer—the Solicitor for the Department of the Interior, is the final supreme court of that Department.

¹Order No. 2509, 17 Fed. Reg. 6794, Sec. 23. Appeals in land cases.

"The Solicitor of the Department of the Interior may exercise all the authority of the Secretary of the Interior with respect to the disposition of appeals to the Secretary from decisions of the Director of the Bureau of Land Management (or his delegates), and from decisions of the Director of the Geological Survey (or his delegates), in proceedings which relate to lands or interests in lands."

Therefore, there is no basis for the contention of petitioners here that the Ninth Circuit's decision would impose upon the Government the dilemma of either foregoing immediate possession of land for public use or else abandoning the traditional and expeditious method of determining the validity of mining claims by the Department of the Interior. (Pet. 8)

In a sense it would be expeditious to use the method above described and thus exclude the Court. What would be a "burden" on the Court to determine the validity of the mining claims in the condemnation action—where the question belongs—would not exist in a hearing organized under the regulations above outlined. There the outcome is a foregone conclusion inasmuch as the Solicitor for the Department of the Interior has already alleged that the mining claims here are invalid, in his direction to the Attorney General to institute eminent domain proceedings.

A mining location, as long as it is a subsisting matter of record and until it has been proven of no value for its mineral content, is real property and an estate of inheritance.⁵ Until the location is terminated by abandonment or forfeiture, it is property in the fullest sense of the word.⁶

⁵*Wilbur v. Krushnic*, 280 U.S. 306, 316, 74 L.Ed. 445, 449, 50 S.Ct. 103.

⁶*Forbes v. Gracey*, 94 U.S. 762, 767, 24 L.Ed. 313, 314; *Ehler v. Wood*, 208 U.S. 226, 52 L.Ed. 464, 28 S.Ct. 263; *Lehes v. Virginia-Colorado Development Corp.*, 295 U.S. 639, 646, 79 L.Ed. 1627, 1630, 50 S.Ct. 889.

It will be noted that in the motion to dismiss, as well as in the summary judgment (R-21), there is no attack upon the validity of the locations, and the allegations of the bill admitted by the motion to dismiss dispose of any such contention.

The reasoning adopted by petitioners (Pet. 17) showing that there is a great burden laid upon the District Court by the Ninth Circuit Court's decision, apparently admits that there would be no such burden if the claims could be heard before the Hearing Examiner under the provisions above set forth. What difference would it make whether there was one claim or ten thousand claims? That would be no argument to take the statutory and constitutional jurisdiction of the Court from it and pass it over to the Bureau of Land Management. Obviously, if the respondents here could be accorded the same fair trial in the Bureau of Land Management hearing as in the Court, there would be the same burden laid upon the Bureau of Land Management.

The fact that there are many property rights to be adjudicated in the large-scale reclamation works is not an argument to deny to these respondents the right to have their properties adjudicated by the Court and the value thereof by a jury.

Petitioners cite authority opposing waiver of rights by the United States (Pet. 9), *United States v. 23,970 Acres*.⁷ This case involved a claim of "election of remedies" in taking over and revoking a lease of

⁷360 U.S. 328, 330, 3 L.Ed.2d 1275, 79 S.Ct. 1193

Government property where the District Court and the Seventh Circuit decided the Government had elected to abandon revocation of the lease and sue for possession. That has no bearing on this case whatsoever. We here are concerned with the matter of ownership of mining claims by location and the institution of a contest against the mining claimants by subordinate officers of the Government when the United States already has possession of the premises under eminent domain proceedings. In the above cited case the United States had full title to the land, subject only to the respondent's lease.

In taking up the claim of petitioners that the filing of the condemnation action did not constitute an irrevocable choice of forum (Pet. 13), the petitioners set up some rather strained contentions. We take up the authorities cited in the footnotes on that page in the petition as follows:

*Railroad Commission v. Pullman Co.*⁸ was a case involving power and authority of the Railroad Commission of Texas, and case was remanded to District Court to retain bill pending settlement in state Court of Commission's authority.

The next is *Burford v. Sum Oil Co.*⁹ involving a Texas statute providing for a uniform method of formation of policy regarding the oil industry. This Honorable Court held that the state Courts were adequate and upheld the District Court dismissal. Nothing in the decision could apply here.

⁸312 U.S. 496, 85 L.Ed. 971, 61 S.Ct. 643.

⁹319 U.S. 315, 87 L.Ed. 424, 63 S.Ct. 1098.

The next was *Louisiana Power & Light Co. v. City of Thibodaux*¹⁰ and was an action whereby, in an eminent domain action, under state law the defendant removed the case to the United States District Court on the basis of diversity of citizenship. At a pre-trial conference, the District Judge, on his own motion, ordered a stay of proceedings until the Supreme Court of Louisiana had been afforded an opportunity to interpret the state law. Nothing therein contained could possibly affect this action.

*Texas, etc. Ry. v. American Tie Co.*¹¹ was an action for damages for refusal of the railroad to pick up ties. It was there held that the statute creating the Interstate Commerce Commission gave that Commission sole jurisdiction and the Courts did not have authority to proceed, as a primary matter.

In *U.S. v. Western Pacific R.R. Co.*¹² the same rule was laid down on the ground that the Interstate Commerce Commission had sole jurisdiction.

*Pennsylvania R. Co. v. U.S.*¹³ was another case where the question of judicial review of an order of an Interstate Commerce Commission could be had.

On the next point, there is no matter herein that had to do with liens, leases, or reversions.

Reference in Pet. 14 to the following also shows the specious character of the argument presented in support of the petition:

¹⁰360 U.S. 25, 3 L.Ed.2d 1058, 79 S.Ct. 1070.

¹¹234 U.S. 138, 58 L.Ed. 1255, 34 S.Ct. 885.

¹²352 U.S. 59, 64-65, 1 L.Ed.2d 126, 77 S.Ct. 161.

¹³363 U.S. 202, 4 L.Ed.2d 1165, 80 S.Ct. 1131.

*Far East Conference v. U.S.*¹⁴ states that the Federal District Court could not pass on the merits of a suit under the Sherman Anti-Trust Act without there having been prior submission of the question to the Federal Maritime Board in accordance with the provisions of the Shipping Act.

*U.S. v. Western Pac. R.R. Co.*¹⁵ came up on certiorari to Court of Claims. This Honorable Court ruled matter was within exclusive primary jurisdiction of Interstate Commerce Commission.

Continuing in the petition, the same line of argument is persisted in (Pet. 16) with the citation of *Macauley v. Waterman Steamship Corp.*¹⁶ which was a case where the District Court dismissed the complaint, seeking to enjoin enforcement of a war contract, on the ground that the Tax Court, under the Renegotiation Act, had exclusive jurisdiction. This Honorable Court affirmed the action of the District Court.

Wholesale rejection and cancellation of the rights to public lands are the order of the day in the Department of the Interior, done without any authority and forcing rightful claimants to abandon their homes and possessions because they have no funds to carry the litigation into the Courts. In the State of California alone, thousands of small tract applications have been arbitrarily cancelled without any reason or cause for the cancellation being advanced by the Bureau of

¹⁴342 U.S. 570, 574-575, 96 L.Ed. 576, 72 S.Ct. 492

¹⁵352 U.S. 59, 64-65; 1 L.Ed.2d 126, 77 S.Ct. 161

¹⁶327 U.S. 540, 90 L.Ed. 839, 66 S.Ct. 712

Land Management. Each one of those several thousand persons was invited by the Bureau of Land Management to file his application for a small tract under the act¹⁷ and paid the filing fee of \$10.00 and advance rental of \$15.00 on each application. Some of these applications were held as long as seven years without any action being had on them, until finally during the months of October and November of 1961 wholesale rejections and cancellations were sent out—not based upon any failure of the applicants to comply with the law and without any reason under the statute being advanced in support of the cancellations.

While it is true this matter is no more germane to the matter before the Court than the argument of petitioners, the statement is made merely to show that people here in the West are not inclined to submit to the Bureau of Land Management unless positively required by law so to do.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated, Sacramento, California,

January 2, 1961.

CHARLES L. GILMORE,

Attorney for Respondents.

¹⁷Act of June 1, 1938, 52 Stat. 609, 43 U.S.C. 682 A-E.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 52

RAYMOND R. BEST, ET AL., PETITIONERS

v.

**HUMBOLDT PLACER MINING COMPANY AND
DEL DE ROSIER**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the district court (R. 17-21) is reported at 185 F.Supp. 290. The opinion of the court of appeals (R. 34-40) is reported at 293 F.2d 553.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1961 (R. 41). On November 15, 1961, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to December 16, 1961 (R. 41). The petition for a writ of certiorari was filed on December 15, 1961, and granted on February 19,

1962 (R. 42). 368 U.S. 983. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The United States brought an action to condemn any outstanding mining claims on certain public lands in order to obtain immediate possession of those lands for the purpose of building a dam. Respondents, among others, assert that they own unpatented mining claims in the land. After the condemnation action was filed, the United States, consistently with its amended complaint, instituted administrative proceedings before the Bureau of Land Management of the Department of the Interior seeking a determination as to the validity of those claims. Respondents thereupon sought an injunction to restrain the conduct of the administrative proceedings.

The question presented is whether the condemnation court acted within its discretion in refusing the injunction and in holding that it would refrain from passing on respondents' claims and valuing them pending a determination of their validity by the administrative tribunal.

STATUTES, REGULATIONS AND RULE INVOLVED

Statutes

Rev. Stat. 441, 5 U.S.C. 485, provides in pertinent part:

The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:

4. Bureau of Land Management.

13. Public lands, including mines.

Rev. Stat. 453, 43 U.S.C. 2, provides:

The Secretary of the Interior or such officer as he may designate shall perform all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

Rev. Stat. 2478, 43 U.S.C. 1201, provides:

The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.

Rev. Stat. 2318, 30 U.S.C. 21, provides:

In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

Rev. Stat. 2319, 30 U.S.C. 22, provides:

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which

they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Rev. Stat. 2322, 30 U.S.C. 26, provides:

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth * * *.

Regulations Relating to Public Lands of the Department of the Interior

Sections 185.1-185.3 of the General Mining Regulations of the Bureau of Land Management, 43 C.F.R. 185.1-185.3, provide:

§185.1 *Lands subject to location and purchase.*
Vacant public surveyed or unsurveyed lands are open to prospecting, and upon discovery of mineral, to location and purchase, as are also lands in national

forests in the public-land States, lands entered or patented under the stock-raising homestead law (title to minerals only can be acquired), lands entered under other agricultural laws but not perfected, where prospecting can be done peaceably, and lands within the railroad grants for which patents have not issued.

§185.2 Definition of mineral under mining laws.

Whatever is recognized as a mineral by the standard authorities; whether metallic or other substance, when found in public lands in quantity and quality sufficient to render the lands valuable on account thereof, is treated as coming within the purview of the mining laws. Deposits of coal, oil, gas, oil shale, sodium, phosphate, potash, and in Louisiana and New Mexico sulphur, belonging to the United States, can be acquired under the mineral leasing laws, and are not subject to location and purchase under the United States mining laws.

§185.3 Manner of initiating rights under locations.

Rights to mineral lands, owned by the United States, are initiated by prospecting for minerals thereon, and, upon the discovery of mineral, by locating the lands upon which such discovery has been made. A location is made by staking the corners of the claim, posting notice of location thereon and complying with the State laws, regarding the recording of the location in the county recorder's office, discovery work, etc.

Section 221.67 of the Appeals and Contests Regulations of the Bureau of Land Management, 43 C.F.R. (1962 Supp.) 221.67, provides:

§221.67 *Government contests.* The Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim.

The Federal Rules of Civil Procedure

Rule 71A of the Federal Rules of Civil Procedure provides in pertinent part:

CONDEMNATION OF PROPERTY

(a) *Applicability of Other Rules.* The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

* * * * *

(h) *Trial.* If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that,

because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

STATEMENT

This case originated with the filing of a complaint by the respondents, Humboldt Placer Mining Company and Del De Rosier, for an injunction to restrain officers of the Department of the Interior from proceeding to obtain an administrative determination of the validity of respondents' mining claims in a contest proceeding instituted before a regional examiner of the Bureau of Land Management. The facts are not in dispute.

In June 1957, the United States brought a condemnation action in the United States District Court for the Northern District of California for the purpose of obtaining immediate possession of and title to any outstanding mining interests in certain federally owned land which was needed for the construction of the Trin-

ity River Dam and Reservoir in California (R. 22).¹ The respondents claim that they own valid unpatented mining claims upon this land. By an amendment to the complaint, the United States reserved jurisdiction to have the validity of the mining claims determined in administrative proceedings before the Bureau of Land Management of the Department of the Interior (R. 22). The district court has issued to the United States a writ of possession, but all other issues in the condemnation action are still pending (R. 34, 20).

In May 1958, the United States, acting pursuant to Section 221.67 of the Regulations Relating to Public Lands of the Department of Interior, 43 C.F.R. 221.67 (*supra*, p. 6), instituted a contest proceeding in the local Land Office of the Bureau of Land Management at Sacramento, California, seeking an administrative determination of the validity of respondents' mining claims. The grounds of contest were that the land embraced within the claims is non-mineral in character and that minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery (R. 14, 17). An amended complaint was filed in the administrative proceedings in March 1960 (R. 10-16).² At that time there had been no hearing upon the validity of the claims in the district court. Respondents, who were required by Section 221.64 of the Public Lands Regulations, 43 C.F.R. 221.64, to answer the allegations of the complaint within 30 days or have the allegations taken as confessed (see R. 16), thereupon

¹ *United States v. 3,563.17 Acres* (N.D. Cal., No. 7570).

² The original complaint is not included in the record of the present litigation. No issue has been raised as to the propriety of the pleadings filed by the United States in the contest proceeding.

brought the present action to enjoin officials of the Department of Interior, who had acted on behalf of the United States in instituting the contest, from proceeding further with that administrative action (R. 3-10). The complaint alleged that the petitioners had acted in excess of their statutory authority in bringing the contest; that the administrative proceedings were in derogation of the district court's exclusive jurisdiction over "settlement and determination of all questions of title and of the right of the United States to the use and occupation of the said premises"; and that failure to enjoin the contest proceedings would subject the respondents to a multiplicity of suits (R. 7-9). The action for an injunction was heard by the same district judge who was sitting in the pending condemnation suit.

On a motion to dismiss the complaint for injunction, the district court granted summary judgment for the United States (R. 17-23). The court noted that the United States had reserved jurisdiction to determine the validity of respondents' claims in administrative proceedings and held that there was no evidence of harassment of the respondents, since the government's purpose in filing the condemnation action prior to instituting administrative proceedings was only to obtain immediate possession of the land. "No authority, or reason," it held, "will support the proposition that such suits constitute an irrevocable election of forum" (R. 18). The district court recognized that there were both precedent and substantial reasons for it to stay its hand on the issue of validity of mining claims in order to allow a "tribunal of more limited jurisdiction [to adjudicate] the issues peculiarly within

its competency" (R. 19). The court stated further (R. 19):

Assuming that this Court has the power to enjoin further proceedings in the contests which are now at issue, there is no good reason for the exercise of such power. To the contrary, there is every reason to allow the issues of the contests to be resolved by the administrative agency, with its special experience and expertise in these matters.

The court concluded that it would hold the condemnation proceedings in abeyance until the validity of the mining claims had been decided in the contest proceedings.

The Court of Appeals for the Ninth Circuit reversed. It noted that the respondents had conceded that, in the absence of the condemnation action, the United States might have initiated a contest proceeding before the Bureau of Land Management for the purpose of obtaining a determination of the validity of unpatented mining claims on public land. "Such is undoubtedly the law," said the court, citing *Cameron v. United States*, 252 U.S. 450 (R. 35). It was the court's view, however, that in initiating the condemnation proceedings, the Secretary of Interior "elected to put into issue [before the district court] the validity of the mining claims" since respondents would be entitled to just compensation only if such claims were valid (R. 37). In so ruling, the court specifically rejected the district court's finding that the United States had resorted to condemnation solely for the purpose of obtaining immediate possession of the lands, and

refused to give effect to the government's reservation in the condemnation complaint of the right to have the validity of the mining claims determined before the Bureau of Land Management (R. 37, 39).

The court of appeals also found Rule 71A(h) of the Federal Rules of Civil Procedure to be a bar to determination of the validity of the mining claims by any other court or administrative agency because that rule, after providing for trial of the issue of just compensation by a jury or a commission of three persons appointed by the condemnation court, states that "Trial on all issues shall otherwise be by the court" (R. 40). In apparent reliance upon its reading of this Rule as a statutory bar to Bureau of Land Management proceedings instituted subsequent to a condemnation action, the court concluded (R. 40):

* * * No statute or controlling authority has been called to our attention indicating that the administrative tribunal, within the Department of the Interior retains jurisdiction to adjudicate the validity of mining claims after the Secretary of the Interior has invoked the jurisdiction of the district court by the filing of a condemnation action in which is raised the same issue.

The court of appeals distinguished *United States v. Minnilee Baker*, 60 I.D. 241 (1948), a decision of the Solicitor of the Department of Interior which is in direct conflict with its holding, on the ground that the only authority cited by the Solicitor is *Cameron v. United States*, 252 U.S. 450. The court was of the view that *Cameron* does not apply.

SUMMARY OF ARGUMENT

A. In order to obtain (for construction of the Trinity River Dam and Reservoir) immediate possession of public lands free of any mining claims, the United States instituted a condemnation action in the federal district court. In its complaint (as amended), it reserved the right to have the validity of any such claims determined in administrative proceedings before the Bureau of Land Management of the Department of the Interior. Thereafter, the government instituted regular contest proceedings before the Bureau seeking a determination of the validity of respondents' claims. Respondents moved in the condemnation court to enjoin the contest proceedings. The court refused the injunction but was reversed by the court of appeals which held that the United States, in bringing the condemnation action, had elected, as a matter of law, to have the validity of the claims determined by the district court and that Rule 71A(h) of the Federal Rules of Civil Procedure barred the district court from exercising discretion "to allow the issues of the contests to be resolved by the administrative agency, with its special experience and expertise in these matters" (R. 19). The question presented is whether, where the government brings a condemnation action for purposes of obtaining immediate possession of public lands free of any mining claims thereon, the condemnation court has discretion to permit a determination of the validity of such claims in administrative proceedings subsequently instituted.

B. A mining claim is a possessory interest founded upon a showing, among other things, that "minerals

have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success, in developing a valuable mine" (*Castle v. Womble*, 19 L.D. 455, 457). Whether one has established a right or interest in public lands is a matter traditionally determined by the Department of the Interior, which has a statutory responsibility for the administration and disposition of the public lands, including mining claims thereon (5 U.S.C. 485; 30 U.S.C. 26; 43 U.S.C. 2, 1201).

Repeatedly since 1849, when the Department of the Interior succeeded to the functions of the General Land Office, this Court has recognized the breadth and exclusivity of the Department's statutory authority over the disposition of the public lands and claims related to those lands. *E.g.*, *Brown v. Hitchcock*, 173 U.S. 473; *Cameron v. United States*, 252 U.S. 450; *Northern Pacific Ry. Co. v. McComas*, 250 U.S. 387, 392. Thus, the Court stated in *Cameron* (p. 462) that "It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior."

C. In this case it is necessary only to decide whether the district court had discretion to allow the validity of claims on the lands condemned to be resolved in proceedings before the administrative agency. The efficient management of public lands and sound judicial practice dictate an affirmative answer. Here, as

in *United States v. Western Pacific R. Co.*, 352 U.S. 59, 64, " * * * the reasons for the existence of the doctrine [of primary jurisdiction] are present and * * * the purposes it serves will be aided by its application in the particular litigation." See *Far East Conference v. United States*, 342 U.S. 570, 574-575.

Determinations as to the validity of mining claims require the exercise of highly specialized judgment concerning testimony and exhibits in the fields of geology, mineralogy, mining engineering, cadastral engineering, geophysics and geochemistry, as well as an understanding of the relationship of the statutory requirements for validity to the structure and purpose of the mining laws and the extensive regulations promulgated by the Department of the Interior. Moreover, the vast number and complexity of the validity proceedings which arise in connection with condemnation and are presently adjudicated before the Bureau of Land Management would, under the court of appeals' decision, seriously increase the already overcrowded dockets of the federal courts.

D. Neither the statutes invoked by the United States in bringing the condemnation action nor the decisions interpreting those statutes support the court of appeals' holding. The United States brought the condemnation action as the only orderly judicial means of obtaining immediate possession of land needed for the Trinity Dam. That an election of forums was not the government's intention is clear from its reservation in the condemnation complaint of the right to have the validity of any mining claims determined by the Department of the Interior (R. 22). Thus, the court of appeals could not have found an election as a matter of choice

but only by operation of law. However, the view that there was an implied election finds no support in the statute which gives the district courts jurisdiction over condemnation actions. Indeed, in *United States v. Eisenbeis*, 112 Fed. 190, 195, the Ninth Circuit itself stated:

[I]t does not necessarily follow, by the commencement of [condemnation] proceedings in the national court, that the title to the land, if in dispute, must be tried therein, and cannot be tried, heard, and determined in any other court. * * *

The instant holding creates just such a "Hobson's choice" as was condemned in *United States v. 93,970 Acres*, 360 U.S. 328. Where the government requires immediate possession of public lands on which there may be adverse private claims, it can obtain such possession only through court proceedings which, according to the court of appeals, would terminate the primary jurisdiction of the Department of the Interior over such claims. There is no reason why the government should not be allowed to invoke judicial procedures to obtain possession of public lands needed for public purposes without losing its right to obtain from the Department of the Interior an expert administrative determination of the validity of mining claims.

Rule 71A(h) of the Federal Rules of Civil Procedure, which the court of appeals found to be a bar to the administrative proceedings, was enacted to deal with other problems and affords no support for the court's holding. The view that this rule requires all issues in a condemnation action to be heard and decided by the

condemnation court finds no support in the history of the rule or in the policies which led to its adoption. The twofold purpose of the rule is (1) to specify the conditions on which trial of the issue of just compensation is to be to the court, to a jury, or to a commission and (2) to allocate between the court, on the one hand, and the jury or Commission, on the other, the determination of relevant issues. It is to this latter objective that the last sentence of this subsection ("Trial of all issues shall otherwise be by the court.") is addressed.

ARGUMENT

The District Court Acted within Its Discretion in Refusing to Enjoin the Administrative Proceedings

A. Introduction

The proposed construction of the Trinity River Dam and Reservoir required immediate possession of 3563.17 acres of public lands on which a large, but indefinite, number of valid and invalid unpatented mining claims were outstanding.³ To obtain such possession, the United States brought a condemnation action in the federal district court. To date, the Sacramento Office of the Bureau of Land Management has reviewed some 6200 unpatented mining claims related to the public lands within the project area. Some of these claims were declared invalid as having been located on public lands not then open to entry under the mining laws (*e.g.*, *Alumina Development Corp. of Utah*, 67 I.D. 68 (1960)); and others were found to be on lands not required for the project. However, as to all

³ The entire Trinity River Dam and Reservoir project will require 10,000 acres of land. S. Doc. 113, 81st Cong., 1st Sess., p. 120.

remaining claims, contest proceedings were instituted before the Bureau of Land Management, including the contest action to test the claims of respondents. A number of these contests have been concluded, some by default of the claimants and others after full adversary proceedings. Still others are now being held in abeyance by the Department of the Interior pending the outcome of this case.⁴ Further dispositions are precluded by the ruling of the court of appeals, which holds that the administrative avenue was shut off by the filing of the condemnation complaint.

If the court's view is correct, the United States, when it wishes to obtain the expert judgment of the Bureau of Land Management, the agency in which the Congress, for more than a century and a half, has lodged full authority for the administration and disposition of the public lands, must forego immediate possession until it is in a position to prosecute contest proceedings before that body. In turn, this will mean substantial delays in the completion of the power, military or other public projects for which public lands are required. Thus, at a minimum, possession will be denied until the United States can complete an investigation of all local land records in the area involved, determine what claims exist and bring the necessary contest proceedings. If the court's decision means that initiation of condemnation terminates the

⁴Administrative proceedings for determination of the validity of claims on public lands involved in other condemnation actions have also been stayed pending determination of this case. See, e.g., *United States v. 324,271.94 Acres*, No. 769-60Y (S.D. Calif.) (temporary restraining order granted November 14, 1961).

Department's authority to conclude pending validity proceedings, the delays necessary to complete those proceedings prior to condemnation would, as a practical matter, ordinarily preclude resort to the administrative process.

In either event, the court of appeals decision would force the United States to bypass the Administrative process. Not only would the expert judgment of this experienced administrative agency be lost, but a flood of lengthy and complicated validity proceedings—some 2050 in this Trinity Dam project alone—would be loosed upon the district courts.

We shall urge below (*infra*, pp. 18-41) that the district court properly refused to enjoin the Bureau of Land Management contest proceedings; that Congress has given the Department of Interior the authority to administer and dispose of the public lands, including any mining claims on such lands; and that there is no reason—whether of policy, logic or authority—for denying the district court the discretion to allow this agency to make that determination in this case.

B. Congress has given to the Department of the Interior primary authority for administration and disposition of the public lands, including mining claims on such lands.

1. *The nature of a mining claim.* A mining claim is a property right in the public lands bestowed by Congress upon any individual who discovers valuable minerals thereon. It is a possessory interest in the land which entitles the claimant to remove and use the minerals found and to be compensated for their value if taken by the government. *North American*

Transportation & Trading Co. v. United States, 53 C. Cls. 424, affirmed, 253 U.S. 330. Respondents allege that they have made such valuable mineral discoveries on the public lands condemned for the Trinity River Dam and Reservoir.

Specifically, the mining laws of the United States, 30 U.S.C. 21 *et seq.*, and the implementing Public Land Regulations, 43 C.F.R. Part 185, have provided for nearly a century that private individuals may obtain the right to possession of public lands and the minerals throughout their entire depth (1) by discovering a valuable mineral deposit and (2) by complying with the local procedural requirements for making a "location." To meet the first condition the claimant must be able to show that " * * * minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine " (30 U.S.C. 21, 22, *supra*, pp. 3-4; *Chrisman v. Miller*, 197 U.S. 313, 322, quoting and affirming the rule laid down by the Land Department in *Castle v. Womble*, 19 L.D. 455, 457). Section 185.3 of the Public Lands Regulations, 43 C.F.R. 185.3 (*supra*, p. 5), sets out the "location" requirements:

Rights to mineral lands, owned by the United States, are initiated by prospecting for minerals thereon, and, upon the discovery of mineral, by locating the lands upon which such discovery has been made. A location is made by staking the corners of the claim, posting notice of location thereon and complying with the State laws, re-

garding the recording of the location in the county recorder's office, discovery work, etc.⁵

In order to hold this possessory title, the claimant must devote at least \$100 worth of labor or improvements to the claim each year (30 U.S.C. 28; 43 C.F.R. 185.16, 185.29).

In order to defend or enforce this possessory right against the government or to obtain compensation for its value upon a taking by the government, the claimant must prove a valid claim—the existence of sufficient valuable minerals and a proper location in accordance with state law. As against the government, no rights arise at all from the mining claim if, for any reason, there has been no valuable mineral discovery. *Cameron v. United States*, 252 U.S. 450, 460-461.⁶

⁵ Mining claims on public lands are recorded locally in accordance with state laws, and not with the Department of the Interior. 30 U.S.C. 28. A mining claim may be located, recorded and worked by the claimant without the federal government's being aware of its existence since notice to the federal government is not required to perfect such a possessory interest in public land. Frequently claims of doubtful validity or of marginal value are located and recorded only to remain dormant forever unless the federal government or some interested private party has reason to challenge the validity of the dormant claim. In recent years Congress has enacted statutes to aid the Department of the Interior in clearing the public domain of the cloud of such claims. See, e.g., Section 7(a) of the Multiple Mineral Development Act, 68 Stat. 708, 711-712.

⁶ The existence of a valid mineral discovery and the devotion of the \$100 annual assessment in working the claim will give the claimant the exclusive right of possession and enjoyment of the land, but not legal title. The claimant may, at any time, secure a fee patent (legal title) to the land by making appropriate application to the Department of the Interior and presenting proper proofs of discovery of valuable minerals and investment of labor or funds in working the claim (30 U.S.C. 29).

The Department of the Interior has issued regulations (43 C.F.R. Part 221) which provide a procedure by which the government may challenge the validity of any such claim by initiating a "contest" proceeding (43 C.F.R. 221.67, *supra*, p. 6). These regulations are authorized by statute, and codify what has long been the practice as to mining claims, 5 U.S.C. 485; 30 U.S.C. 22; 43 U.S.C. 1201; see *Cameron v. United States*, *supra*. Contest proceedings are conducted in accordance with the Administrative Procedure Act (*United States v. O'Leary*, 63 L.D. 341) and claimants are entitled to judicial review if the ultimate administrative decision is adverse. See, e.g., *Foster v. Seaton*, 271 F. 2d 836 (C.A. D.C.).⁷

2. *The authority of the Department of the Interior over mining claims.* The Department of the Interior was created in 1849, Act of March 3, 1849, 9 Stat. 395, for the purpose, among others, of performing "all the duties in relation to the General Land Office, of supervision and appeal, now discharged by the Secretary of the Treasury * * *". The General Land Office in turn had been created by Congress in 1812 and charged with the duty to (2 Stat. 716)

superintend, execute and perform, all such acts and things, touching or respecting the public lands of the United States, and other lands patented or granted by the United States, as have heretofore been directed by law to be done or performed in the

⁷ The validity of a claim may also be determined in a proceeding instituted by a third party claiming adversely to the claimant, 43 C.F.R. (1962 Supp.) 221.51, and in a proceeding initiated by the claimant himself in order to obtain a patent for the land claimed, 30 U.S.C. 29.

office of the Secretary of State, of the Secretary and Register of the Treasury, and of the Secretary of War, or which shall hereafter by law be assigned to the said office.

In carrying out this mandate, the Land Office had consistently exercised the power to determine the validity of rights claimed by private parties in the public lands. See *Harkness & Wife v. Underhill*, 1 Black 316, which records an instance in 1838 where the General Land Office determined as between two private claimants which was entitled to public land.

Since succeeding to these responsibilities in 1849, the Secretary of Interior has continuously been vested by Congress with plenary authority over the administration and disposition of the public lands. In the broadest terms, Rev. Stat. 441, as amended, 5 U.S.C. 485, has given the Secretary and his Department authority over the public business relating to public lands, including mining. The Secretary, from the beginning, has been made responsible for performance of all executive duties relating to the sale of public lands, to private claims in such lands, and to the issuance of patents for all grants of land. Rev. Stat. 453, 43 U.S.C. 2. Congress has also specifically authorized the Secretary to make appropriate regulations to carry into execution the statutory provisions relating to the public lands. Rev. Stat. 2478, as amended, 43 U.S.C. 1201. Regulations had been issued by the Department of the Interior to carry out public land laws even before enactment of this extensive and exclusive delegation of authority. When Congress first enacted the present law making min-

eral lands of the United States open to all citizens of the United States, Act of July 26, 1866, 14 Stat. 251, the Department of the Interior issued a set of "instructions" thereunder to govern the registers and receivers in the local land offices in their administration of the Act. Zabriskie, *Land Laws of the United States* (H. H. Bancroft and Company, 1870), p. 200. These instructions, which spell out the requirements to be met by a valid mining claim and the means of testing validity in administrative proceedings before the appropriate agencies of the Department of the Interior, are now found in the Code of Federal Regulations, 43 C.F.R. Parts 185, 221.

Repeatedly, since 1849, the Court has recognized the breadth and exclusivity of the Secretary's statutory authority over disposition of the public lands and claims relating to those lands. *Bishop of Nesqually v. Gibbon*, 158 U.S. 155, 166-167; *Brown v. Hitchcock*, 173 U.S. 473; *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 190 U.S. 301; *Riverside Oil Co. v. Hitchcock*, 190 U.S. 316; *Cameron v. United States*, 252 U.S. 450, 459-461; *Gaines v. Thompson*, 7 Wall. 347, 353-354; *Litchfield v. Register and Receiver*, 9 Wall. 575; and *Shepley v. Cowan*, 91 U.S. 330. In *Cameron v. United States*, *supra*, Cameron had claimed a valid mineral discovery on public lands. The claim was rejected after full proceedings before the Land Office, and when Cameron would not vacate the land (a part of Grand Canyon National Monument) the United States sued in the federal court to enjoin his occupation. This Court held the Secretary's ruling conclusive, quoting from *Catholic Bishop of Nesqually v. Gibbon*, *supra*, at 166, 167: "It may be laid down as a general rule that, in the ab-

sence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior" (*Cameron v. United States, supra*, at 462). The Court gave this detailed explanation of the Secretary's authority to determine the validity of mining claims (*id.* at 459-461; emphasis added):

By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. Rev. Stats., §§ 441, 453, 2478 * * * [citations omitted].

A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated. * * *

Of course the land department has no power to strike down any claim arbitrarily, *but so long as the legal title remains in the Government it does*

have power, after proper notice and upon adequate hearing, to determine whether the claim is valid, and, if it be found invalid, to declare it null and void. This is well illustrated in *Orchard v. Alexander*, 157 U.S. 372, 383, * * *. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts or forbid an inquiry and determination in the Land Department. * * * *In other words, the power of the department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed.*

The Court has thus held that the Department of the Interior has exclusive jurisdiction to determine rights in the public lands so long as no patent has been issued and legal title remains in the United States. See, also, *Northern Pacific Ry. Co. v. McComas*, 250 U.S. 387, 392; *Brown v. Hitchcock*, 173 U.S. 473, 477. According to these cases, the courts are not to touch the issue of title as between the United States and a private claimant or between private claimants until proceedings before the Department of the Interior have been brought and finally determined. In *Brown v. Hitchcock*, *supra*, a private claimant sued in the federal court for cancellation of an order of the Secretary of the Interior which declared certain lands claimed by the plaintiff from the State of Oregon to be part of the public domain. The Court sustained a demurrer to the complaint and held that, as no patent had been issued, legal title had not passed and that "so long as the legal title remains in the Government all questions of right should be solved by ap-

peal to the land-department and not to the courts" (*id.* at 477).

The Court had taken the same position in holding that the courts are without jurisdiction to enjoin or mandamus an officer of the Land Department in order to control his exercise of judgment and discretion in determining the validity of claim to public lands (*Riverside Oil Co. v. Hitchcock, supra*, at 324):

Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands.

Where a patent has been issued, the Court has held that it is to be given conclusive effect by the courts in a subsequent title dispute (*Steel v. Smelting Co.*, 106 U.S. 447, 451):

In *Johnson v. Towsley*, the effect of the action of that department was the subject of special consideration. And the court applied the general doctrine, "that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others," and said, speaking by Mr. Justice Miller, "that the action of the land-office in issuing a patent for any of the public land, subject to sale

by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated, and in all courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained." 13 Wall. 72, 83.

The statutes, regulations issued pursuant thereto, and the judicial precedents announced by this Court over more than a century leave no doubt, then, that the only tribunal which was open to respondents to establish their rights against the United States was the Department of the Interior.* The cases establish the further proposition that until legal title has passed—with the issuance of a patent—the validity of any claim is to be determined by the Department of the Interior in exercise of its primary jurisdiction. In holding that, although no patents for the lands had been issued, the filing of the condemnation action transferred exclusive primary jurisdiction to the district court to determine the validity of the claims, we

* There are cases where in a suit to quiet title by the United States or to eject trespassers from public lands, the courts have, as part of the general issue, determined whether there has been a valid mineral discovery. *Kennedy v. United States*, 119 F. 2d 564 (C.A. 9); *United States v. Mobley*, 45 F. Supp. 407 (S.D. Cal.); *United States v. Schultz*, 31 F. 2d 764 (N.D. Cal.). We have found no case where such a determination has been made by a court at the request of a claimant and over the objection of the United States.

believe the court of appeals was disregarding the statutes and the historic teaching of this Court's long-settled decisions.

3. Reasons of sound judicial and land management administration dictate the conclusion that the condemnation court has discretion to permit the validity of mining claims to be determined in administrative proceedings before the Bureau of Land Management.

There is no need, in this case, to decide whether the district court would have been compelled, on the ground that the matter is one within the exclusive primary jurisdiction of the Department of the Interior, to stay its hand. The only question presented is whether the district court had discretion "to allow the issues of the contests to be resolved by the administrative agency, with its special experience and expertise in these matters" (R. 19). At the least, we believe, the district court was correct in holding that "where a court has jurisdiction of an entire controversy, it may wait until a court or tribunal of more limited jurisdiction adjudicates the issues peculiarly within its competence, and then give binding effect to the decision of such court or tribunal" (R. 19).

It is, of course, settled practice for the federal courts to stay the exercise of their jurisdiction in appropriate circumstances, to enable either a state court⁹ or

⁹ See *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496; *Burford v. Sun Oil Co.*, 319 U.S. 315; *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25; *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957).

an administrative tribunal¹⁰ to adjudicate issues peculiarly within its competence. This Court has pointed out that (*Far East Conference v. United States*, 342 U.S. 570, 574-575):

* * * in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Here, as in *United States v. Western Pacific R. Co.*, 352 U.S. 59, 64, " * * * the reasons for the existence of the doctrine [of primary jurisdiction] are present and * * * the purposes it serves will be aided by its application in the present litigation." ¹¹

¹⁰ See, e.g., *Texas & Pacific Ry. v. American Tie Co.*, 234 U.S. 138; *United States v. Western Pacific R. Co.*, 352 U.S. 59; *Pennsylvania Ry. Co. v. United States*, 363 U.S. 202; *Civil Aeronautics Board v. Modern Air Transport, Inc.*, 179 F. 2d 622, 625 (C.A. 2); *United States v. Railway Express Agency, Inc.*, 89 F. Supp. 981 (D. Del.). See also Jaffe, *Primary Jurisdiction Reconsidered*, 102 U. Pa. L. Rev. 577, 584-592.

¹¹ It has been a common practice for the federal courts in condemnation proceedings to recognize the validity of contempora-

The Department of the Interior is the expert agency established by Congress for adjudication of mining claims on the public lands. The intricacy of the factual determinations on which validity depends calls for the expertise which the agency possesses and which the courts would be hard put to duplicate. The number and complexity of the validity proceedings which arise in connection with condemnation and are heard by the examiners in the Bureau of Land Management would seriously increase the already overcrowded dockets of the federal courts. In the circumstances, deference to the agency's authority to determine the validity of mining claims will not only promote the interest of sound and orderly judicial administration, but will also serve the purposes for which Congress created the agency and invested it with authority over such claims—the encouragement of prospecting for minerals, conservation of resources and maintenance of the integrity of the public lands—by promoting a uniform and expert administration of the statutes and regulations.

This administrative process for determination of the validity of private mining claims has been in operation for almost a century. A present staff of nine hearing examiners,¹² all of whom are available for assignment

neous or subsequent litigation in the state courts on questions of state law such as tax matters, local property law involving creditors' rights, equitable title and interpretation of lease provisions. *United States v. Adamant Co.*, 197 F. 2d 1, 12 (C.A. 9); *United States v. 25.936 Acres, Bergen County, N.J.*, 153 F. 2d 277 (C.A. 3); *Florida Beaches v. Niagara Inv. Co.*, 148 F. 2d 963 (C.A. 5); *United States v. 150.29 Acres in Milwaukee, Wis.*, 135 F. 2d 878 (C.A. 7); *United States v. Eisenbeiz*, 112 Fed. 190 (C.A. 9); *United States v. 70.39 Acres of Land*, 464 F. Supp. 451, 481 (S.D. Cal.).

¹² Hearing examiners are appointed in accordance with the requirements of Section 11 of the Administrative Procedure Act

to mining claim cases, handles a large volume of this litigation. Seventy-five to eighty per cent of the total hearings held by these examiners involve the adjudication of mining claims. In the fiscal year 1960-1961, 322 mining law cases (involving 1,162 separate claims) were brought before the hearing examiners. Of these, 81 cases (343 claims) were closed on procedural grounds without a hearing; in 241 cases (involving 819 claims), hearings on the merits were held and decisions rendered by the hearing examiner; in 90 of these cases, appeals were taken to the Director of the Bureau of Land Management. Many other mining claims are disposed of without the necessity of proceedings before a hearing examiner. The Bureau of Land Management's statistical report for the fiscal year 1961 indicates that there were a total of 27,228 mining claim adjudication cases closed during the year. These included 7,457 title transfer cases (*e.g.*, patent applications and land disposition conflicts), and approximately 20,000 mining claim investigations by the Bureau's mining engineers for the purpose of determining validity or invalidity.¹³

In order to determine the validity of mining claims,

(5 U.S.C. 1010) and the Civil Service Commission Regulations issued pursuant thereto (5 C.F.R. Part 34). All are attorneys and have qualifying experience of from 12 to 34 years. Only two have less than 20 years experience in handling public lands matters.

Prior to the decision in *United States v. O'Leary*, 63 L.D. 341, the validity of mining claims was determined in proceedings conducted before the managers of the local land offices who heard the evidence and rendered initial decisions.

¹³ The statistics have been obtained from the Statistical Appendix, Annual Report of the Director, Bureau of Land Management for Fiscal Year, 1961, Part 4, pp. 93-122.

numerous factual questions involving highly technical evidentiary presentations must ordinarily be resolved. It is the type of determination which, as the district court found (R. 19), requires the experience and expertise afforded by the Bureau of Land Management investigation and hearing process. The examiner must determine whether the claimant has made a proper "location" in accordance with local mining laws (43 C.F.R. 185.3 *et seq.*); whether the claimant's rights have been maintained by compliance with the work requirements of the statutes (30 U.S.C. 28, 29); and whether there has been satisfaction of the statutory requirements for discovery of a "valuable" mineral deposit of "such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success" (*Castle v. Womble*, 19 I.D. 455, 457; *Chrisman v. Miller*, 197 U.S. 313, 322). The application of these requirements to a particular mining claim requires the exercise of highly specialized judgment concerning testimony and exhibits in the fields of geology, mineralogy, mining engineering, cadastral engineering, geophysics and geochemistry, as well as an understanding of the relationship of the requirements to the structure and purpose of the mining laws and the extensive regulations promulgated by the Department of the Interior. See, e.g., *Foster v. Seaton*, 274 F. 2d 836, 838 (C.A. D.C.). Conflicting expert testimony must be resolved. Survey and public land status records must be considered and areas of conflict determined. As illustrative of the many and complex issues that may arise in

connection with such adjudications, see *Cole v. Ralph*, 252 U.S. 286; *United States v. Altman*, 68 I.D. 235; *United States v. Carlile*, 67 I.D. 417; *Gabbs Exploration Co.*, 67 I.D. 160.¹⁴

Administrative proceedings for determination of the validity of claims are conducted in accordance with long established, detailed regulations authorized by statute and published in the Code of Federal Regulations (43 C.F.R. Part 221). Claimants, who are guaranteed due process (*Cameron v. United States*, 252 U.S. 450, 461), are afforded all the protections elaborated in the Administrative Procedure Act (*United States v.*

¹⁴ Typical factual questions concern the general geology of the area, and that of the claims in question; the relationship of the geological findings to the history of previous attempts to mine the minerals claimed in the same or similar areas; the technical possibilities of successfully extracting minerals from the claims under feasible mining engineering and milling methods; the required plant and equipment, effect of climate, availability and skill of labor, access to transportation, and other such factors; evaluation of mining and geologic maps, drilling records and techniques, geo-physical and geochemical prospecting histories and records, assay samples of various workings, and the sampling theories and techniques used; economic evaluations of present and future worth, including estimates of recoverable values in the light of the quantity and quality of minerals which can be feasibly mined, the costs of production, and availability of markets. In addition, customs of miners become relevant to the determination of such questions as which of competing claimants made a prior claim and what is the physical extent of a claim (e.g., how far a claimant is entitled to follow a particular vein).

Details of the technical factors involved in these determinations are summarized and explained in *Field Handbook for Mineral Examiners*, Bureau of Land Management, U. S. Department of the Interior, January, 1961. Details of the adjudication of mining claims and the validity determination process within the Department of the Interior are set forth in the *Manual of the Bureau of Land Management*, Volume VI, Parts 3-5.

O'Leary, 63 I.D. 341),¹⁵ and may appeal from the examiner's decision to the Director of the Bureau of Land Management (43 C.F.R. (1962 Supp.) 221.1-221.20) and from the Director to the Secretary of the Interior (43 C.F.R. (1962 Supp.) 221.31-221.37). If the Secretary's decision is adverse, the claimant is entitled to judicial review (*e.g.*, *Foster v. Seaton*, *supra*).

Under the decision of the court of appeals, a vast number of validity cases now determined administratively would have to be heard and determined by the district courts. Thus, the validity of any unpatented claim on lands condemned by the United States would have to be determined by the condemnation court before just compensation could be awarded and the case closed. This would include both claims which are presently heard by the examiners as well as those which are disposed of by the Bureau of Land Management without the necessity of proceedings before the examiners. The

¹⁵ The opinion of the court of appeals notes in successive sentences that (1) the Solicitor of the Department of the Interior may exercise all of the authority of the Secretary on appeals from the Bureau of Land Management regarding public lands decisions and (2) the Solicitor is the official who directed the filing of the condemnation action in which it is "alleged" that the mining claims were invalid (R. 38). Although the court of appeals draws no express conclusion, the inference is that the Solicitor is acting both as prosecutor and judge in these matters. No such inference is warranted. The condemnation proceeding is brought on behalf of the Bureau of Reclamation, and the adjudication of the mining claims will be before hearing examiners of the Bureau of Land Management. These are independent bureaus of the Department of the Interior. The prosecuting and adjudicative functions are handled entirely separately and by different people. The functions ultimately merge at the top echelon of the Department, *viz.*, in the Solicitor and Secretary, but this is true generally of administrative adjudications by the Department of the Interior or any other executive department.

1960-1961 fiscal year statistics (*supra*, p. 31) give an indication of the massive volume of litigation involved. Thus, in the Southern District of California alone, over 2,200 unpatented mining claims are involved in pending condemnation litigation (see report of the United States Attorney for the Southern District of California, attached hereto as an appendix). In the Northern District of California, the Sacramento Regional Office of the Department of the Interior has processed some 6,200 unpatented mining claims on the single project that gives rise to the present litigation. Over 2,000 of these were included in the condemnation proceedings. The significance of this burden can be appreciated by comparing the 1,682 cases of all types which were pending in the Northern District at the close of the third quarter of 1961¹⁶ with these 2000 unpatented claims, each of which would present a separate case to be determined by the court on the basis of its own particular facts.

In those circumstances, the district court was more than justified in concluding (R. 19) that "there is every reason to allow the issues of the contests to be resolved by the administrative agency, with its special experience and expertise in these matters." As the court pointed out (R. 17), the government was challenging the validity of the mining claims on the grounds that the land involved is non-mineral in character and that minerals have not been found in sufficient quantities to constitute a valid discovery (see R. 14). These are issues coming within the "special competency

¹⁶ Table C-1, Quarterly Report of the Director of the Administrative Office of the United States Courts.

and administrative experience" of the "Bureau of Land Management * * * in the hearing of contests of claims relating to the public lands" (R. 19). Particularly in view of the rule that courts ordinarily are precluded from enjoining the conduct of administrative proceedings (see, *e.g.*, *Macauley v. Waterman Steamship Corp.*, 327 U.S. 540); the court of appeals erred in overturning the district court's decision to permit the administrative proceedings before the expert agency to go forward.

C: Nothing in the statutory provisions invoked by the United States in bringing the condemnation action denies the condemnation court discretion to allow determination of the validity of mining claims in proceedings before the Department of the Interior.

The United States brought the condemnation action as the only orderly judicial means of obtaining immediate possession of the land needed for the Trinity Dam and for determining, in due course, the amount of just compensation due to owners of valid mining claims on the land. The court of appeals specifically recognized that neither the filing of the condemnation action nor the order for immediate possession constitutes an admission by the United States as to the validity of the mining claims. However, the court found in the filing an election by the United States to have the validity of any such claims determined by the condemnation court. In addition, it held that Rule 71A(h) of the Federal Rules of Civil Procedure barred determination of that issue by another court or by an administrative agency. We submit that both rulings were in error.

That the government intended no election is clear from its reservation in the condemnation complaint of the right to have the validity of the claims determined by the Department of the Interior (R. 22). Thus, the court of appeals could not have found an election as a matter of choice but only by operation of law.

The decision, however, finds no support in 28 U.S.C. 1358 which confers original jurisdiction upon the district courts "of all proceedings to condemn real estate for the use of the United States * * *." Nothing in this section or its legislative history indicates that the jurisdiction, once invoked, is exclusive or that it requires the court to determine every issue. See *United States v. Eisenbeis*, 112 Fed. 190 (C.A. 9); *United States v. 25,936 Acres*, 153 F. 2d 277 (C.A. 3); and cases cited at pp. 29-30, n. 11, *supra*. Thus in *Eisenbeis*, the Ninth Circuit itself stated (*id.* at 195):

* * * it does not necessarily follow, by the commencement of [condemnation] proceedings in the national court; that the title to the land, if in dispute, must be tried therein, and cannot be tried, heard, and determined in any other court.¹⁷

¹⁷ Neither *United States v. 10,245 Acres of Land*, 50 F. Supp. 470 (E.D. Wash.), nor *United States v. Bothwell Co.*, 7 F. 2d 624 (D. Wyo.), is to the contrary. Both decisions are consistent with the position of the government here that the district court retained discretion to permit proceedings for determination of the validity of a private claim to go forward before the Department of the Interior.

In *Bothwell Co.*, Bothwell's transferor had filed for a patent in 1903 and became legally entitled to its issuance in 1905 since no protest or contest had been filed. *Lane v. Hoglund*, 244 U.S. 174; *Payne v. Newton*, 255 U.S. 438. Condemnation proceedings were commenced May 10, 1909. On August 26, 1909, the General Land Office formally preferred charges that the entry by Bothwell's

Moreover, the decision of the court of appeals is contrary to the holding of this Court in *United States v. 93,970 Acres, supra*. There, it was argued that the United States had waived its right to deny a claimant's interest in certain property by bringing an action to condemn the same interest. The Court rejected this contention, holding that the doctrine of election of remedies does not force the government to choose between abandoning its contention that the adverse claimant had no rights in the property and giving up its right to obtain immediate possession under condemnation law. The Court stated (360 U.S. at 332):

We see no reason either in justice or authority

transferor was invalid. An administrative hearing was had and it was adjudged in 1911 that the entry should be cancelled. The district court held that the patent should have issued in 1905 and rejected the contention that it had no jurisdiction to try the issue of Bothwell's title. It held that in bringing the condemnation action the United States had conferred jurisdiction upon the court, that the subsequent administrative proceedings were void under *Lane v. Hoglund* and *Payne v. Newton* and that the court could recognize that Bothwell's transferor had had a legal right to issuance of the patent.

In *United States v. 10,245 Acres of Land, supra*, the condemnation court tried the issue of the validity of an alleged homestead claim and found it invalid. Although this was the result sought by the government, the court did not consider the government's contention that the determination of invalidity should have been rested upon an administrative order cancelling the claim which was issued after proceedings before the Land Office. The cancellation proceedings had been initiated seven months after the declaration of taking had been filed in the condemnation action but were concluded prior to the court's decision. While we believe the court erred in not giving effect to the administrative decision, its action was not in conflict with that decision and in no sense stands for the proposition that the court lacked authority to permit the administrative agency to determine validity.

why such a Hobson's choice should be imposed and why the Government should be forced to pay for property which it rightfully owns merely because it attempted to avoid delays which the applicable laws seek to prevent. Such a strict rule against combining different causes of action would certainly be out of harmony with modern legislation and rules designed to make trials as efficient, expeditious and inexpensive as fairness will permit.

The ruling of the court of appeals would impose upon the government a Hobson's choice similar in all material respects to that condemned in *93,970 Acres*. In both cases the government could have proceeded to determine the issue of title prior to bringing a condemnation action, but only at the expense of foregoing immediate possession. In both cases a condemnation action was appropriate because, if the issue of validity of title were determined against the government, the government would still wish to take the property involved, paying the just compensation determined in the condemnation proceeding. In *93,970 Acres* this Court declared that initiation of the condemnation action does not prevent the district court from resolving both the question of title and the amount of compensation required for the taking, if title is in the claimant. For the same reasons, the filing of an action for condemnation should not preclude the district court from allowing an administrative tribunal to determine the question of title while reserving de-

termination of the amount of compensation required for the taking if title is in the claimants.¹⁸

Rule 71A(h) of the Federal Rules of Civil Procedure does not preclude reference of the issue of validity of the mining claim to the Department of the Interior. The interpretation of the rule by the court of appeals as requiring the district court to decide all the issues in the condemnation suit would preclude reference of questions of state law to appropriate state tribunals. This reading of Rule 71A(h), which is in conflict with the decisions of many courts which have stayed condemnation actions to allow matters of state law to be tried in state courts,¹⁹ is wholly unwarranted.

The twofold purpose of Rule 71A(h) was (1) to specify the conditions on which trial of the issue of just compensation was to be to the court, to a jury or to a commission and (2) to allocate between the court,

¹⁸ Under the court of appeals decision, the government would be forced to proceed by the undesirable physical-seizure approach where it required immediate possession but wished to avoid an election of forums. See *United States v. Dow*, 357 U.S. 17. Such a seizure under the powers of eminent domain and without benefit of judicial procedure would plainly leave no basis for a conclusion that the government had waived the jurisdiction of the Department of the Interior to adjudicate the validity of mining claims. As this Court has indicated in another connection, however, the substantive results should be the same whether the taking is by condemnation or physical seizure. *United States v. Dow*, *supra*. To the extent the court might validate a claim which would be invalidated in a proceeding before the expert administrative agency, the result would be contrary to the teaching of *Dow*. In any event, clearly no purpose would be served by forcing the government, in such cases, to abandon the orderly judicial procedure established by Congress, with its numerous protections for the condemnee, in favor of the seizure method, leaving the property-claimant to a suit under the Tucker Act for his sole remedy.

¹⁹ See cases cited *supra*, pp. 29-30, n. 11.

on the one hand, and the jury or commission, on the other, the determination of relevant issues. It is to the latter problem that the last sentence of the subsection is addressed: "Trial of all issues shall otherwise be by the court." There was plainly no purpose of limiting the court's recourse to state tribunals or administrative agencies on questions appropriate for their determination. The obvious role of the quoted sentence is to foreclose any argument that there is a right to jury trial on issues other than just compensation. There is nothing in the history of the Rule, and we know of no reason as a matter of policy, that can be given for precluding the courts in appropriate cases of securing the assistance of more expert bodies—state courts or administrative agencies—to determine particular matters.

The rule adopted by the court of appeals would impose unprecedented limitations upon district courts in federal condemnation proceedings and would deprive them of aid in disposing of their business. It finds no parallel, so far as we are aware, in any other type of case coming before the federal courts. That the rule-makers had no such aim in mind is indicated by the fact that, except as to matters not pertinent here, the federal rules applicable to civil cases generally are declared applicable to federal condemnation proceedings.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

STEPHEN J. POLLAK,
Assistant to the Solicitor General.

ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys.

AUGUST 1962.

APPENDIX

MINING CLAIMS INVOLVED IN PENDING LITIGATION—
SOUTHERN DISTRICT OF CALIFORNIA

3129-PH	291 Unpatented Claims
769-60-Y	129 Not examined
(Mojave B Range)	55 Validated
	105 Unvalidated
	2 No decision
311-ND	598 Unpatented Claims
3472-ND	161 Validated
(Inyokern Naval Test Station)	437 Unvalidated
14018-PH, et al.	1,246 Unpatented Claims
(29 Palms Marine Base)	22 Validated
	1,113 Unvalidated
	111 No decision
14361-Y	2 Unvalidated
(Randsburg Wash Test Range)	1 No examination
1782-SD	55 Unpatented Claims
2426-SD	5 Validated
(Chocolate Mountain Aerial Gunnery Range)	11 Unvalidated
	39 No decision
19963-WB	66 Unpatented Claims
(Cuddeback Lake Air Force Range)	66 Unvalidated

Office Supreme Court, U.S.
FILED

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In the Supreme Court
OF THE
United States

—
OCTOBER TERM, 1962
—

No. 52
—

RAYMOND R. BEST and WALTER E. BECK,
Petitioners,

vs.

HUMBOLDT PLACER MINING COMPANY and
DEL DE ROSIER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENTS
—

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In the Supreme Court
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No. 52

RAYMOND R. BEST and WALTER E. BECK,
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DEL DE ROSIER,
Respondents.

**On Writ of Certiorari to the United States Court of Appeals
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BRIEF FOR RESPONDENTS

OPINIONS BELOW

Opinion of the District Court (R. 17-21) is reported in 185 Fed.Supp. 290.

Opinion of the Court of Appeals (R. 34-40) is reported in 293 F.2d 553.

Judgment of the Court of Appeals was entered August 18, 1961. (R. 41.)

Petition for writ of certiorari was filed December 15, 1961 and granted February 19, 1962. (R. 42.)

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where the United States has submitted to the primary jurisdiction of a Federal Court by its complaint in eminent domain, may the petitioners, as subordinate officers, lawfully treat the District Court as a mere *forum non conveniens* and institute other *in rem* proceedings against respondents when respondents are barred from operating their mines by an outstanding writ of possession?
 2. Would a plea of a burdensome trial by the District Court be sufficient to grant an additional *in rem* action as an administrative proceeding so as to deny respondents their right to a jury trial in evaluating their mining properties?
 3. Would the injection of extraneous matters into a case by means of a petition for certiorari be permissible when the questions were not raised either in the District Court or in the Appellate Court by briefs or otherwise?
-

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes relating to and governing mining locations, together with the principal regulations of the Department of the Interior governing proceedings of the character herein involved, are printed in this brief as an Appendix, to which reference is hereby made.

A brief summary of the law is set forth herein as preliminary for a more extended summation in the argument.

A mining location based upon a discovery of valuable mineral is a grant of real property to the locator by the United States and is an estate of inheritance.

30 U.S.C.A. 22, 26, 35;

Wilbur v. United States ex rel. Krushnic, 280

U.S. 306, 316, 74 L.Ed. 445, 449, 50 S.Ct. 103.

The Constitution provides, among other things, "nor shall private property be taken for public use without just compensation."

Amendment V.

The word "property" is addressed to every sort of interest the citizen may possess. The word "taken" is the deprivation of the former owner rather than the accretion of a right or interest to the sovereign. If the governmental action is so complete as to deprive the owner of all or most of his interest in the subject matter, it is a "taking".

U. S. v. General Motors Corp., 323 U.S. 373,

378, 65 S.Ct. 357, 359, 89 L.Ed. 311, 156

A.L.R. 390.

The taking possession of property under eminent domain proceedings is provided in

40 U.S.C.A. 258a. (See Appendix.)

The procedures under eminent domain are provided in

28 U.S.C.A. Rule 71A and 71A(i)(3). (See Appendix.)

The jurisdiction of the District Courts in eminent domain proceedings is provided for in

28 U.S.C.A. 1358.

The authority of the Solicitor of the Department of the Interior to submit to the Attorney General applications for institution of proceedings for condemnation is provided for in Order No. 2509 of the Secretary of the Interior, as published in the Federal Register July 24, 1952 beginning at page 6793 thereof.

The authority of the Solicitor of the Department of the Interior to exercise all power and authority of the Secretary thereof with respect to the disposition of appeals to the Secretary from decisions which relate to lands or interests in lands, is provided for in Section 23 of the above Order No. 2509. (See Appendix.)

We have been unable to find any statute authorizing the State Supervisor of the Bureau of Land Management to take over pending condemnation proceedings in part and transfer the jurisdiction of the Court to himself and the Bureau of Land Management while he is a defendant in a pending suit questioning his authority. To rule he can do so is tantamount to a finding he can, on his own motion, deprive the Court of jurisdiction over him, although the verified complaint on file against him alleges he is acting beyond his statutory authority.

The Regional Solicitor and Assistant Regional Solicitor, and their assistants are under the direct orders of the Solicitor of the Department and they do all the local legal work in connection with contests

and the prosecution of a Government contest before the Bureau of Land Management, acting as attorney for the Bureau and its officers. The Bureau of Land Management has no other attorney.

STATEMENT

Respondents herein, as plaintiffs, brought this action (R. 3-16) in Federal District Court to enjoin petitioners, who are subordinate officials of the Department of the Interior, from removing from the jurisdiction of the District Court an *in rem* action in eminent domain and subject the mining properties of respondents to a "contest" before its Bureau of Land Management, as filed March 17, 1960.

Respondents alleged in their verified complaint filed in the District Court that they are the owners of thirteen placer mining locations, the location notices thereof being duly recorded in the Recorder's Office of the County of Trinity, State of California. Each mining location is alleged to include lands of established and known mineral character upon which—as to each separate claim—a discovery of valuable mineral, to wit: gold, has been made and the said claims and each of them have been and are held and worked by extensive excavations for their valuable gold content, and that the value is in excess of \$10,000.00.

It is further alleged that the petitioners herein, in proceeding through the medium of said contest, were acting in excess of their statutory authority therefor, and the respondents herein would be required to enter

in upon prolonged and useless litigation and submit themselves to an unlawful exercise of attempted jurisdiction on the part of the petitioners.

It is further alleged that the United States, named as contestant in said contest, is the plaintiff in the eminent domain proceedings and has selected the United States District Court as the proper forum to determine all questions involved in said contest, and that the said petitioners were invoking the power and sovereignty of the United States of America without any warrant or authority of law.

It will be noted that, among the allegations in said contest (R. 13), the petitioners claim that, so far as known to the contestant (United States), there are no proceedings pending before the Department of the Interior for the acquisition of title to or any interest in such lands on behalf of any party other than contestees (respondents herein).

The District Court granted a temporary restraining order (R. 17) on April 18, 1960, and on June 21, 1960 entered its order (R. 17) vacating and dissolving the temporary restraining order, and that the complaint be dismissed. Thereafter and on July 11, 1960 the District Court entered its summary judgment of dismissal (R. 22), stating therein that the purpose of the condemnation cases was to obtain immediate possession of the lands, and that the Government has not raised therein the issue of the validity of the mining claims concerned.

The Court of Appeals for the Ninth Circuit reversed. (293 F.2d 553.) (R. 34.)

SUMMARY OF ARGUMENT

The respondents, petitioners here, have changed their grounds for the intervention of this Honorable Court as they presented them before the Court of Appeals.

We quote from the Brief for Appellees, petitioners here, on page 5 of the brief as filed in that Court:

"A. The purpose of the condemnation suit was to obtain immediate possession of the lands. These lands were needed for the construction of the Trinity River Dam and Reservoir. The United States alleged in the condemnation complaint that it was the owner of the lands involved and that the mining claims were invalid."

Why this paragraph was omitted in the petition for the writ of certiorari can best be explained by the petitioners themselves, or their counsel.

The eminent domain action as filed in the District Court of the United States for the Northern District of California, Northern Division, June 24, 1957 (R. 7, p. VI), numbered therein 7570, entitled *United States of America v. C. F. Starr et al.*, filed June 24, 1957 (R. 7, p. VI), and encompassed 3,583.17 acres, more or less.

The United States, as plaintiff therein, chose its forum and it brought the action to obtain not only the immediate possession of the land, but to acquire whatever title or interest the various defendants, including respondents herein, had in and to their property.

U.S. v. General Motors Corp., 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311, 156 A.L.R. 390.

When the United States filed the suit, it submitted itself to the jurisdiction of the Court for all purposes in connection with the litigation, and the District Court should have proceeded to the determination of all questions involved, even though the case may have resulted in a judgment against the United States.¹

The power and authority of the United States in Eminent Domain proceedings is as broad as the Constitution itself—and it cannot be controlled or defeated—by any other authority.²

The immediate issuance on June 27, 1957 of a writ of possession placed the United States in sole and exclusive possession of all of the lands involved herein to the absolute exclusion of respondents.

Why the delay of two years, nine months and twelve days, is not explained, particularly when petitioners urge the vital necessity of the Bureau of Land Management proceedings.

The Bureau of Land Management could not determine any question relating to the lands involved on any date later than June 27, 1957—that being the date when the United States entered into full possession of the lands.³

The United States was here proceeding in the condemnation suit against a *grant* by the United States,

¹U. S. v. *The Thetla*, 266 U.S. 328, 339-341, 45 S.Ct. 112, 69 L.Ed. 313;

Jones v. Watts, 142 F.2d 575, 577, 173 A.L.R. 240 (cert. den. 323 U.S. 787, 65 S.Ct. 310, 89 L.Ed. 628).

²U. S. v. *Carmack*, 329 U.S. 230, 67 S.Ct. 252, 91 L.Ed. 209.

³U. S. v. *Doy*, 357 U.S. 17, 20-21, 78 S.Ct. 1039, 1041-1044, 2 L.Ed. 2d 1109.

and not a mere *lease* wherein the fee title to the land belonged to the United States and the lease authorized the United States to revocation upon presentation of a notice of cancellation.⁴

In the case of *Cameron v. U. S.*, 252 U.S. 450, it will be noted that this Honorable Court at the outset was careful to state that Cameron went into the Land Office proceedings *without objection* and thus submitted himself to its jurisdiction. The only point before the Court for decision was whether Cameron could relitigate a question of fact that he had agreed could be litigated in the Land Office proceedings.

Thirty-six years later a case came before the Department of the Interior where timely objection to the hearing was entered at the outset by counsel for the contestee. The Secretary of the Interior decided⁵ that in a contest involving a mining location, a hearing before the Manager was not authorized by law, and the Department was required to conform to the Administrative Procedure Act.

We have been unable to find any statute authorizing a purely administrative agency to intervene in pending litigation before the Courts, and in the name of the United States lift the case from the Federal Court and itself take jurisdiction over the subject matter.

Further, we submit that the Department of the Interior, being a mere administrative body not bound

⁴ U. S. v. 93,970 acs., 360 U.S. 328, 329, 79 S.Ct. 1193, 1194, 31 L.Ed. 2d 1275.

⁵ U. S. v. O'Leary and Moore, 63 I.D. 341.

by its own decisions, is not authorized by any federal rule of civil procedure or of practice, or by any statute of Congress, to determine the question of its own jurisdiction or any question of law or any question of mixed law and fact, such as would be encountered here.

As pointed out in the decision of the Court of Appeals in this case and as admitted by petitioners in their reply brief before that Court, the Solicitor for the Department is the official at whose direction the condemnation action herein was filed by the Attorney General on behalf of the United States, and in which it is alleged that appellants' mining claims are invalid. Further, the Solicitor may exercise all of the authority of the Secretary of the Interior with respect to the disposition of appeals to the Secretary from the decisions of the Director of the Bureau of Land Management or his delegates.*

A subordinate of the Solicitor of the Department is the prosecuting attorney in hearings before the Bureau of Land Management, and a Hearing Examiner may not, at his peril, disregard suggestions of the prosecutor when that person is the subordinate of the supreme court of the Department of the Interior. At least it has not happened during the six years last past.

Since the Solicitor of the Department has already prejudged the status of the mining claims involved, he would not reverse himself in any mere contest.

*Order No. 2509, 17 F.R. 6794, Sec. 23.

THE CASE OF PETITIONERS

A. To cite a single phrase or sentence out of text of a Court decision as authority for a point advanced as germane to and controlling the major premise of the cause being submitted to the Court is not only specious, but burdens the Court and opposing counsel with the herculean task of reading a plethora of words to no productive end.

If there is a statute or a decision that authorizes a purely administrative agency such as the Bureau of Land Management to lift out of the jurisdiction of a federal court an action in eminent domain under a claim of primary jurisdiction, respondents will welcome the citations.

And if this may be done without first petitioning the Court so to do, we respectfully request the citation that states such a bureau is supreme over the federal courts.

To cite decisions of this Honorable Court or of lower courts in cases involving the Interstate Commerce Commission, Civil Aeronautics Board, National Labor Relations Board, Federal Power Commission, and similar independent agencies, as controlling here is to lift a purely administrative agency to a commanding position neither justified nor legalized by any statute of Congress.

§ If the Bureau of Land Management is vested with the power and authority so to arbitrarily take over pending litigation from a Federal District Court, then the reviewing authority granted by the Administrative

Procedure Act would be nullified by rule of the agency.'

THE CLAIM OF HARDSHIP

B. For the first time in the course of this litigation, petitioners have raised the point of hardship in that divers, countless suits in the courts now hang in space with the Bureau of Land Management unable to arbitrarily subject them to an alleged hearing prior to judgment in prior initiated eminent domain proceedings.

In an appendix to their brief filed in August, 1962, we have a full page of "hardship" cases. This heart-rending list is amplified on pages 34 and 35 of that brief.

This "Little Eva" story with all its pathos was not submitted to the District Court nor to the Appellate Court.

It, like Little Eva, "just grewed". It had no parent and no sponsor, and since it was no part of the record submitted to the Courts below nor argued by petitioners, it has no place here.

Further, it is no argument to say that the ruling in the Appellate Court will delay other similar cases. The instant case of eminent domain has been pending in District Court since June 24, 1957 (R. 7, p. VI), and not the slightest effort has been put forth by the Federal Government to proceed to trial, although re-

spondents have been barred from operating their properties.

ATTACKS ON OUR TRIAL JUDGES

To label, by indirection, the many fine trial judges of our Federal District Courts as inept incompetents incapable of trying mining cases is an unwarranted aspersion upon their learning, their experience and their devotion to their respective positions.

With nearly forty-five years of trial practice as a background, this counsel is justified in his resentment of the inferences.

No federal trial judge this counsel has ever known was or is inferior in ability to any hearing examiner in the employ of the Department of the Interior.

It is a wholly fatuous postulate to set up in argument that only the Bureau of Land Management has the necessary "expertise" to pass upon or determine the value of the mines of respondents. There is no proof (beyond self-serving declarations) that the Bureau has any employees trained and experienced in mine operation. Merely because a person has a degree in mining engineering does not make him an executive capable of operating a mine at a profit.

The "expertise" available in evaluating mines or mining locations are not all on that Department's payroll. There are many paying mines in the United States staffed by able, capable and experienced mining and metallurgical engineers, but it is extremely doubtful if any one of them could qualify for their respec-

tive positions as "prudent" men under the definition of the Interior Department. However, they make their properties pay a profit.

Illustrative of the opinion held by the Department of its "expertise" is the decision of the office of the Solicitor of that Department. We cite *Ex Parte Fred and Mildred M. Bohen, et al.*, 65 I.D. 65, 67:

"It is not incumbent on the personnel of the local offices to advise claimants in detail how to assert their rights and while the Department would frown on a deliberate attempt on the part of Bureau personnel to mislead an applicant with respect to the requirements of any particular procedure, no such showing has been made here. It is well settled that the Department is not bound by erroneous advice given by its employees and that one who acts on such advice acts at his peril."

CITATIONS NOT AVAILABLE TO RESPONDENTS

C. On page 33 of petitioners' brief we are cited to a publication of the Bureau of Land Management, Department of the Interior: *The Manual of the Bureau of Land Management*.

This manual is said to contain rules and regulations governing evidence and procedure in hearings.

The manual is available only to Department employees and attorneys of the Attorney General's and Solicitor General's office. This manual is super-confidential and the public, including opposing counsel, is denied access to it. Counsel for respondents has repeatedly been denied the right to see and examine it, with the statement such denial is pursuant to direct

orders from the Bureau offices at Washington, D. C., as it is solely for official use and plainly labeled "CONFIDENTIAL".

Under such denial, respondents would not be afforded a "fair and open hearing" before the Department and it would be a denial of the right "to know the claims of the opposing party and to meet them."

It is useless to base any facet of this case upon any decision of the Department of the Interior. Said Department is not bound by its own rules nor its own decisions. *Res judicata* is not recognized in the Department. It has stated in many, many cases that it is not bound by the doctrine of *stare decisis*.

CHARACTER OF A MINING LOCATION

A mining location is a grant from the United States and is an estate of inheritance.

Wilbur v. U. S., 280 U.S. 307, 316, 50 S.Ct. 103;

Forbes v. Gracey, 94 U.S. 762, 24 L.Ed. 313.

The owner of a mining claim, as long as it is a subsisting matter of record and not invalidated, owns all of the claim or location and is vested with the exclusive right of possession.

El Paso Brick Co. v. McKnight, 233 U.S. 250;

257, 58 L.Ed. 943, 947.

He never has to obtain a patent.

Clipper Mining Co. v. Eli M. & M. Co., 194 U.S.

220, 48 L.Ed. 944.

Morgan v. U. S., 304 U.S. 1, 18-22, 58 S.Ct. 773, 776-778, 82 L.Ed. 1129.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Dated, Sacramento, California,
September 19, 1962.

Respectfully submitted,
CHARLES L. GILMORE,
Attorney for Respondents.

(Appendix Follows)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

RAYMOND R. BEST and WALTER E. BECK,

Petitioners

v.

HUMBOLDT PLACER MINING COMPANY and
DEL DE ROSTER

SUPPLEMENTAL MEMORANDUM FOR PETITIONERS.

ARCHIBALD COX,
Solicitor General,

STEPHEN J. POLLAK,
Assistant to the Solicitor General,

ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys,
Department of Justice,
Washington 25, D.C.

STATUTES RELATING TO MINING

Sec. 22

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining districts, so far as the same are applicable and not inconsistent with the law of the United States, R.S., Sec. 2319; Feb. 25, 1860, c. 85, Sec. 1, 41 Stat. 437.

Sec. 26

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines

extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. . . . R.S. Sec. 2322.

Sec. 35

Claims usually called "placers," including all forms of deposit, excepting veins of quartz or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands. And where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the 10th day of May 1872, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead purposes. R.S. Secs. 2329, 2331; Mar. 3, 1891, c. 561, Sec. 4, 26 Stat. 1097.

Sec. 36

Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having continuous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the 9th day of July 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser. R.S. Sec. 2330; Mar. 3, 1891, c. 561, Sec. 1, 26 Stat. 1097.

Sec. 38

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under sections 21-24, 26-30, 33-48, 50-52, 71, 76 of this title, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent. R.S. Sec. 2332.

Sec. 53.

No possessory action between persons, in any court of the United States; for the recovery of any mining title, *or* for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession. R.S. Sec. 910.

PUBLIC LANDS—

FUNCTIONS OF THE DEPARTMENT OF THE INTERIOR

Reorganization Plan No. 3 of 1950 Eff. May 24, 1950, 15 F.R. 3174, 64 Stat. 1262, 5 U.S.C.A.

Sec. 481—Sec. 4

(a) Except as otherwise provided in subsection (b) of this section, there are hereby transferred to the Secretary of the Interior all functions of all other officers of the Department of the Interior and all functions of all agencies and employees of such Department.

(b) This section shall not apply to the functions vested by the Administrative Procedure Act (60 Stat. 237) in hearing examiners employed by the Department of the Interior, nor to the functions of the Virgin Islands Corporation or of its Board of Directors or officers.

Sec. 483a

The legal work of the Department of the Interior shall be performed under the supervision and direc-

tion on the Solicitor on the Department of the Interior, who shall be appointed by the President with the advice and consent of the Senate. July 31, 1956, c. 801, Title I, Sec. 106 (b), 70 Stat. 739.

Order No. 2509, 17 Fed. Reg. 6791.

Sec. 23

Appeals in land cases. The Solicitor of the Department of the Interior may exercise all the authority of the Secretary of the Interior with respect to the disposition of appeals to the Secretary from decisions of the Director of the Bureau of Land Management (or his delegates), and from decisions of the Director of the Geological Survey (or his delegates), in proceedings which relate to lands or interests in lands.

Reorganization Plan No. 3, Sec. 103.

Eff. July 16, 1946, 11 F.R. 7876.

60 Stat. 1100, 43 U.S.C.A.

Sec. 1 (1959 Supp.)

(a) The functions of the General Land Office and of the Grazing Service in the Department of the Interior are hereby consolidated to form a new agency in the Department of the Interior to be known as the Bureau of Land Management. The functions of the other agencies named in subsection (d) of this section are hereby transferred to the Secretary of the Interior.

(d) The General Land Office, the Grazing Service, the offices of Commissioner of the General Land Office, Assistant Commissioner of the General Land

Office, Director of the Grazing Lease Service, all registers of the district land offices, and United States Supervisor of Surveys, together with the Field Surveying Service now known as the Cadastral Engineering Service, are hereby abolished.

(c) The Bureau of Land Management and its functions shall be administered subject to the direction and control of the Secretary of the Interior, and the functions transferred to the Secretary by subsection (a) of this section shall be performed by the Secretary or, subject to his direction and control, by such officers and agencies of the Department of the Interior as he may designate.

EMINENT DOMAIN

40 U.S.C.A.

Sec. 258a

In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file, in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. . . .

28 U.S.C.A.

Rule 71 A

This rule provides the procedures to be followed in United States District Courts for the condemnation of real and personal property under the power of eminent domain, and the following portions apply:

Rule 71A(c)(3). "At any time, if compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

Sec. 1358.

The district courts shall have original jurisdiction of all proceedings to condemn real estate for the use of the United States or its departments or agencies. June 25, 1948, c. 646, 62 Stat. 935.

OCTOBER TERM, 1962

No. 52

RAYMOND R. HEST and WALTER E. HECK,

Petitioners

v.

HUMBOLDT PLACER MINING COMPANY and
DEL DE ROSIER

SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

These comments are in reply to the memorandum submitted by respondents in answer to two questions posed by the Chief Justice at the oral argument of the above cause:

1. In determining the validity of a mining claim on public lands, can any fact be proved in the district court that cannot be proved in proceedings in the Department of the Interior?

We do not know of any facts that may be shown to a district court in connection with determination of the validity of an alleged mining location which could not be introduced in the administrative proceeding. The prerequisites for a valid claim are established by the mining laws of the United States, 30 U.S.C. 21 et seq., and the implementing Public Land Regulations, 43 C.F.R. Part 185, and are the same in either forum. The claimant must show that there is a valuable mineral deposit and

would apply except insofar as administrative procedure is less rigid, thus permitting the parties more latitude in presenting evidence. The evidence referred to on page 3 of respondents' memorandum, i.e., the testimony of engineers and miners familiar with the alleged locations as of June 24, 1957, would be admissible before either tribunal. This is clear from the resumes of testimony appearing in the Department of the Interior decisions cited supra.

Insofar as respondents are under the impression that just compensation would be determined by the Department of the Interior, rather than by a jury (see page 4 of respondents' memorandum), they are laboring under a misapprehension. The sole function of the Department of the Interior will be to determine the validity of the claim. The jury in the condemnation case will determine just compensation for any of respondents' claims which the Department of the Interior determines to be valid.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

STEPHEN J. POLLAK,
Assistant to the Solicitor General.

ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys,
Department of Justice,
Washington 25, D.C.

JANUARY 1963.

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In an attempt to demonstrate that they would be prejudiced if the proceedings before the Bureau of Land Management are permitted to go forward, respondents argue that prior rulings of the Department of the

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1962

No. 52

RAYMOND R. BEST and WALTER E. BECK,

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v.

HUMBOLDT PLACER MINING COMPANY and

DEL DE ROSIER

Respondents,

AFFIDAVIT

CITY OF WASHINGTON)

DISTRICT OF COLUMBIA)

ss:

KARL S. LANDSTROM, Director, Bureau of Land Management, United States Department of the Interior, being duly sworn, deposes and says:

That he denies affirming the statement made in the last paragraph, page 3, of the Answers by Respondents to Special Questions in the above captioned case, that "proof of a producing mine operating at a profit at the day of hearing was the only positive proof of the existence of a valid, existing mining location that would be accepted by the Department".

Signed this 21st day of December, 1962, at Washington, District of Columbia

DEL DE ROSIER

Respondents,

CITY OF WASHINGTON

DISTRICT OF COLUMBIA

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KARL S. LANDSTROM, Director, Bureau of Land Management, United States Department of the Interior, being duly sworn, deposes and says:

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Signed this 21st day of December, 1962, at Washington, District of Columbia

/s/

Karl S. Landstrom

Karl S. Landstrom

SEAL

Subscribed and Sworn to before
me this 21st day of December,
1962. Louis S. Hillman, Notary
Public D.C. My commission
expires 3/31/1967

Interior require a showing of the discovery points ^{1/} and of a producing mine operating at a profit "at the day of hearing" (p. 3 of respondents' memorandum) as a condition to a valid claim. They contend that, since the project has been constructed and the claimed location is now under water, the necessary proof could not be produced. The short answer is that if this were the proof required by the statute and regulations, respondents would have to meet it whether the proceeding went forward before the administrative tribunal or in the courts. If it is not-- and we know of no decisions which so hold--then any administrative ruling requiring such proof would be subject to reversal on judicial review. ^{2/}

In fact, the conclusion drawn by respondents is unwarranted. It is not the practice of the Bureau of Land Management, as suggested by respondents at page 2 of their memorandum, to limit proof to the condition of the mining location as of the date of the hearing. Although we have found no case involving the validity of a mining claim on public lands condemned by the United States, the decisions of the Bureau of Land Management and the Secretary of the Interior indicate that the validity of the claim would be determined as of the date of the taking, June 24, 1957, and that all facts relevant thereto would be admissible.

The rule is a simple and reasonable one. The validity of a mineral claim is determined as of the date when the claim is placed in issue by an application for a patent, by initiation of a contest or by withdrawal of public lands from among those open to the future location of claims. For example, if an application for a mineral patent is filed,

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1/ By discovery points, we understand respondents to mean merely the physical location of the allegedly valuable minerals. Obviously, to sustain a valid claim, the minerals must be shown to have existed at the time of the taking within the area delineated by the location.

2/ Under the Act of October 5, 1962, P.L. 87-748, 76 Stat. 744, such review could be had in the same district court.

for this proposition and in no sense supports the contention for which respondents cite it. In Logomarcini, the Secretary held that before a mineral patent would be issued, the applicant must show that his claim was valuable for minerals at the time the patent application was filed and not forty years previous when the first entry was made. The fact that the claim was valuable for gold in 1909 was irrelevant to the question whether the claim was valuable for minerals some forty years later when all the gold had been mined.

Similarly, the Bureau of Land Management determines the validity of mining claims as of the date contest proceedings are filed, not the date when the hearing on the contest is held. United States v. North, A-27936; United States v. Pumice Sales Corporation, A-27578.^{3/} In the same way, when public lands are withdrawn from availability for mining claims, the Bureau of Land Management determines the validity of any outstanding claims as of the date of the withdrawal order, not the subsequent date when the hearing is held. United States v. Coleman, A-28557; United States v. Riggle, A-27184; United States v. Everett, A-27010; and see Cameron v. United States, 252 U.S. 450. In all these cases, evidence that the land claimed was valuable for mining operations at the date of the patent application, the contest initiation or the withdrawal order is relevant and, accordingly, admissible.

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As indicated in the affidavit of Mr. Karl Landstrom, Director of the Bureau of Land Management, attached hereto, as well as the decided cases, the statement in the last paragraph of page 3 of respondents' memorandum with respect to the alleged statements of Mr. Landstrom is incorrect. As noted above, the cases do not require "proof of a producing mine operating at a profit at the day of hearing" or at any other time. The statute requires that the lands be valuable for mineral operations. The date as of which this value must be proved in this case is the date

^{3/} Copies of these and the other unpublished opinions cited herein have been filed with the librarian of this Court.

of the taking, and the existence of a working mine is only one means of proof. More common proof consists of testimony of engineers and geologists.

2. Would any different rules of evidence apply in the two tribunals?

The answer to this question is that the same rules of evidence would apply except insofar as administrative procedure is less rigid, thus permitting the parties more latitude in presenting evidence. The evidence referred to on page 3 of respondents' memorandum, i.e., the testimony of engineers and miners familiar with the alleged locations as of June 24, 1957, would be admissible before either tribunal. This is clear from the resumes of testimony appearing in the Department of the Interior decisions cited supra.

Insofar as respondents are under the impression that just compensation would be determined by the Department of the Interior, rather than by a jury (see page 4 of respondents' memorandum), they are laboring under a misapprehension. The sole function of the Department of the Interior will be to determine the validity of the claim. The jury in the condemnation case will determine just compensation for any of respondents' claims which the Department of the Interior determines to be valid.